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U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN,

Plaintiff,

vs.

RICKY BELL,

Defendant.

Civil Case # 3-96-0380

Beginning February 6, 1998

[REDACTED]

CLERK'S COPY

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE TODD J. CAMPBELL

APPEARANCES:

For the Plaintiff:

Bradley A. MacLean &
William P. Redick, Jr.
Attorneys at Law
Nashville, TN

For the Defendant:

John H. Baker, III &
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Official Court Reporter:

John W. Tummel, RPR
801 Broadway, Rm. A-839
Nashville, Tn. 37203

1 February 12, 1998.

2 THE COURT: Good morning. Welcome back.
3 Day five. What is our agenda today? You are on your
4 feet so you get singled out.

5 MR. MACLEAN: I want to advise the Court,
6 Mr. Brian Stephenson one of our expert witnesses is in
7 the courtroom today. We request permission for him to
8 sit through the testimony today.' He will be testifying
9 later on.

10 THE COURT: Under the 700 series of rules
11 an expert can sit through other testimony and opine on
12 what he or she hears. That would be an exception to Rule
13 615 which is what they call in General Sessions Court
14 rule.

15 MR. MACLEAN: Your Honor, I would like to
16 introduce in evidence at this time the judgment of
17 conviction relating to the 1970 conviction which was used
18 as an aggravating circumstance --

19 THE COURT: Not the '72?

20 MR. MACLEAN: Not the '72.

21 Along with that, I have the docket sheet
22 from the court file in that case. I would like to
23 introduce the docket sheet and judgment into evidence as
24 Exhibit 146.

25 THE COURT: All right. Any objection?

1 MR. BAKER: Just a minute, Your Honor. No
2 objection, Your Honor.

3 THE COURT: That will be 146.

4 MR. MACLEAN: Mr. Redick will take over
5 from here.

6 THE COURT: What is the plan, Mr.
7 Redick?

8 MR. MACLEAN: We have a witness.

9 MR. REDICK: We have a witness to call.

10 THE COURT: Who are you going to call?

11 MR. REDICK: Mr. John Zimmermann.

12 THE COURT: Let's invite him in and have a
13 discussion.

14 Good morning, Mr. Zimmermann.

15 A. Good morning. I've never met you before. I am
16 John Zimmermann.

17 (Whereupon, the witness was duly sworn.)

18 MR. REDICK: One second, Your Honor.

19 THE COURT: Take your time.
20
21
22
23
24
25

EXAMINATION OF JOHN ZIMMERMANN

BY MR. REDICK:

Q. State your name, please.

A. John Zimmermann.

Q. Mr. Zimmermann, you are presently employed as an Assistant District Attorney in Davidson County, Tennessee is that correct?

A. Yes.

Q. How long have you been employed there?

A. Since February of 1982.

Q. When did you graduate from law school?

A. 1974.

Q. When were you admitted to the bar?

A. 1974.

Q. What did you do from the time you were admitted to the bar until you went to work for the District Attorney General's Office?

A. I spent four years in the United States Army satisfying an obligation I had with them as a jag officer, which was a military lawyer and four years with the State Attorney General's Office.

Q. Have you ever been in private practice?

A. No.

Q. Have you ever represented criminal defendants?

A. Yes.

1 Q. When was that?

2 A. When I was assigned to the jag corps in the United
3 States Army for about three years. Three of my four
4 years was as a defense lawyer.

5 Q. Now, when you went to work for the District
6 Attorney General's Office, what was your assignment?

7 A. I was assigned to Division One to prosecute
8 general felony assignments, whatever came there, before
9 Judge Leathers.

10 Q. How long did you work in Division One?

11 A. I don't really remember. It was Judge Gray
12 succeeded Judge Leathers and later we had Judge Kurtz who
13 was a civil judge took on duties as a criminal judge.

14 I took the criminal docket myself and
15 Eddie Barnard, Kattie Novack were assigned duties down in
16 Judge Kurtz' court to handle the general felonies down
17 there.

18 Q. Do you recall when you went to Judge Kurtz'
19 court?

20 A. No, I do not.

21 Q. Was there a team leader in that group?

22 A. Yes. His name was Eddie Barnard.

23 Q. This was a team that went to court every day to
24 Judge Kurtz', is that correct?

25 A. That's correct.

1 Q. How long had you been working assigned to Judge
2 Kurtz prior to the James Lee Jones' case?

3 A. I don't know.

4 Q. But you had been practicing in that capacity
5 practicing in Judge Kurtz' court every day?

6 A. Yes.

7 Q. Now, Mr. Zimmermann, when this case was heard in
8 post conviction, Judge Kurtz allowed you to just testify
9 without examination, did he not?

10 MR. BAKER: I object. The record doesn't
11 show that. He was examined and cross-examined.

12 Q. Well, he allowed you to examine yourself on direct
13 testimony, did he not?

14 A. Mr. Redick, I don't really remember. I remember
15 that I think it was Paul Morrow who handled the case for
16 Mr. James Lee Jones.

17 I don't remember if he called me to
18 testify or -- I just don't remember.

19 Q. You called yourself, didn't you?

20 A. I don't remember. Whatever the record shows is
21 what happened.

22 Q. Well, as a matter of fact it is not uncommon for
23 you to offer your testimony through your own questions in
24 Judge Kurtz' court?

25 A. Extremely rare. I can only remember of testifying

1 twice. This is about the fourth time I ever testified,
2 and I am nervous. I don't like testifying.

3 Q. But he has allowed you to do that, has he not?

4 A. Mr. Redick, I can only remember -- I don't know if
5 it was maybe just one other time where there was
6 something that needed to be stated on the record. Judge
7 Kurtz' practice was rather than a lawyer standing up
8 from the lectern to make a statement, he wanted it done
9 under oath. He preferred that.

10 If it was ever done, it was only because
11 his requirement was that if it was going to be considered
12 as facts, he wanted it under oath.

13 Q. In this case, the James Lee Jones' case, you
14 had primary responsibility for the prosecution, did you
15 not?

16 A. Yes. I was assigned the case by Eddie Barnard.

17 Q. Now, you understand the ABA standard of the
18 prosecution function, that the obligation of the
19 prosecutor is unique in the sense that you have an
20 obligation to all parties, do you not?

21 A. I agree with that, yes.

22 Q. It is your obligation to present the truth,
23 right?

24 A. Yes, sir.

25 Q. Now this is an adversarial form, we understand

1 that. But you have another overlaying obligation over
2 and above that, to present the case as it is not only as
3 an advocate, is that correct?

4 A. That's correct.

5 Q. You also have special obligations under Brady
6 versus Maryland, is that correct?

7 A. That's correct.

8 Q. Describe to the court what you understand your
9 obligations to be under Brady versus Maryland.

10 A. Required to disclose affirmative evidence upon
11 request, exculpatory evidence upon request by defense
12 counsel, anything that appears to the prosecutor to be
13 exculpatory whether or not there is a request to provide
14 that, too.

15 Q. Now, this is an obligation whether there is a
16 request or not, isn't that correct?

17 A. Yes. I would consider it that way, if there is
18 something favorable.

19 Q. United States Supreme Court considered it that
20 way?

21 A. I consider it that way, too.

22 Q. And the obligation is to turn over anything
23 exculpatory, correct?

24 A. Yes. That is what exculpatory is.

25 Q. Exculpatory means anything favorable to the

1 defendant in your custody?

2 A. Yes. Anything that would mitigate the punishment
3 or be a defense to the defendant, yes.

4 Q. And anything in your custody would mean
5 anything in your file or anything in the file of law
6 enforcement officers investigating the case, anything
7 within your reach, your actual custody or constructive
8 custody?

9 A. I can only turn over what I am aware of.

10 Q. But you have an obligation to be aware --

11 A. I think the state does. I am not trying to
12 quibble with you. I can't be personally responsible if I
13 am not personally aware of it.

14 I think the state as a government is
15 responsible if it is something the state is aware of it.

16 Q. The law is clear, is it not, that you are held
17 accountable for exculpatory information in the files of
18 police officers investigating a case that you are
19 prosecuting, isn't that true?

20 A. Yes. I think the state is.

21 Q. You as the prosecutor would be the one to turn it
22 over, would you not?

23 A. Yes, I would.

24 Q. Now, do you remember when your deposition was
25 taken in this case?

1 A. Yes.

2 Q. Do you remember testifying that in order to obtain
3 a death penalty case perhaps in any case but particularly
4 in this case you felt you were going to have to explain
5 everything to the jury?

6 A. I don't remember testifying to that. That is what
7 I do believe.

8 Q. And I think you testified that in your opinion
9 Davidson County jurors may be a little tougher to get
10 death sentences from?

11 A. I haven't read my deposition. I can't tell you
12 here what I testified to. I do believe that is so.

13 Q. So, as you approached this case you felt that you
14 were going to have to have a very tight case?

15 A. Well, when you say tight case, what I want the
16 judge to understand, I feel like juries in Tennessee want
17 to know, want to be sure beyond a shadow of a doubt that
18 the person that the state is seeking the death penalty on
19 was the one that was actuality responsible for the
20 murder. It is not beyond a reasonable doubt but a shadow
21 of a doubt.

22 They want that comfort. I think that is
23 what you have to show them. I think that is why Corey
24 Mathus in Clarksville didn't get the death penalty,
25 because they were never able to explain for sure that he

1 was one of the trigger men.

2 Q. So, you don't deny testifying in your deposition
3 that you are -- quote -- not going to get the death
4 penalty if there is any doubt in the jury's mind as to
5 who's guilty or what happened or who's really
6 responsible?

7 A. That is what I would have said.

8 I haven't read the deposition. I don't
9 know what is in the deposition.

10 Q. You don't deny saying that?

11 Do you want to look at it?

12 A. If you are asking me what --

13 MR. BAKER: If he could ask the question
14 and let him answer it.

15 THE COURT: I think that was asked and
16 answered.

17 He essentially acknowledged that is his
18 view.

19 Q. Also, Mr. Zimmermann, how many death penalty cases
20 have you prosecuted?

21 A. I think it is six. I think it is six. Five or
22 six.

23 Q. Have you ever prosecuted and sought the death
24 penalty against a defendant who was not the actual
25 assailant?

1 A. Let me see.

2 THE COURT: You are talking about felony
3 murder basically?

4 MR. REDICK: Basically?

5 A. No, I don't believe we have. We have sought death
6 penalty against people that insisted someone else
7 inflicted the fatal blows or some other person did, some
8 other accomplice did maybe.

9 I can't think of one where we did.

10 Q. Your theory was that the defendant you were
11 prosecuting did inflict the fatal blows?

12 A. Yes. That is according to Norma Norman.

13 Q. Well, in every case you prosecuted?

14 A. Yes. Or was commanding. If you have a group of
15 accomplices and one is commanding that one inflict the
16 fatal blows, I think that makes them equally guilty.

17 Q. Do you recall at the deposition using the language
18 you wouldn't seek the death penalty against someone who
19 is not the shooter or sticker?

20 A. I don't remember saying that. That is something I
21 would say. I believe someone sitting out in the car
22 driving a getaway car is just not going to be the kind of
23 person that a jury is going to feel like is deserving of
24 the death sentence.

25 Q. As you approached the prosecution in this case,

1 you were very concerned about proving the case, were you
2 not?

3 A. I think, yes, every case. Every death penalty
4 case you don't stop preparing until the case is over.

5 Q. This is part of your notion, that you felt that
6 the jury, this Davidson County jury had to be convinced
7 beyond a shadow of a doubt of the assailant before they
8 imposed death?

9 A. Yes, I felt we had to do that.

10 Norma Norman, as you recall, she had been
11 taped by the defendant and blindfolded with duct tape and
12 she was -- so that was the problem.

13 Q. You also didn't have any confession or statement
14 from the alleged assailant, according to your theory of
15 the prosecution, did you?

16 A. I don't remember.

17 Q. You didn't have a confession?

18 A. We didn't have a confession, no. I don't know
19 what kind of statement he did make. I have forgotten
20 what kind of statement he made. I think he was
21 interviewed at one time.

22 Q. You had no murder weapon traceable to the
23 defendant?

24 A. No, we did not. But we had the tires that were
25 kind of unique tire tracks.

1 Q. You had testified the trial there was a match on
2 tire tracks parked in front of the apartment?

3 A. Yes, an unusual thing. He had four different
4 tires on the vehicle that the defendant had been using
5 and two different -- as I recall, one or two different
6 tires made a tire imprint and showed that the car was
7 backed in rather than pulled in.

8 Q. Now, you had no fingerprints on the murder weapon,
9 did you?

10 A. We didn't have a murder weapon. The answer would
11 be no. I don't think we had one.

12 Q. Wasn't there a knife used as a murder weapon that
13 was obtained from Patrick Daniels' kitchen?

14 A. I just forgotten that, Mr. Redick. I don't
15 remember.

16 Q. Does that refresh your recollection?

17 A. No, it doesn't. I don't dispute it.

18 Q. Let me ask you if you could to look at that
19 exhibit book, Exhibit Number 12, and tell us what that
20 is?

21 A. Well, it is titled state response to motion for
22 discovery.

23 Q. Is this your motion or response?

24 A. It has my signature. I recognize my signature.

25 Q. What is the date of the certificate of service?

1 A. 21st day of August, 1986.

2 Q. This was served on Neal McAlpin, is that
3 correct?

4 A. Neal McAlpin, yes.

5 Q. Look on the fourth page, a Tennessee Bureau of
6 Investigation Laboratory report.

7 Tell us what that is?

8 A. Tell you what it says?

9 Q. Not reading it but in summary what it is?

10 A. A lab report from the TBI.

11 Q. About what.

12 THE COURT: Are we on date stamp 482?

13 MR. REDICK: Yes.

14 A. It says, Exhibit Number 11, one kitchen knife with
15 wooden handle. Overall approximate length ten and three
16 quarters inches.

17 Q. Examination requested. Latent prints. Results.
18 Exhibit 11 was examined and processed with no latent
19 prints being present or developed?

20 A. That is what it says.

21 Q. In this case the kitchen knife was submitted
22 to the lab and no fingerprints were found, is that
23 right?

24 A. I don't have any recollection of it. Whatever the
25 report says is what it means. I don't recall what it

1 pertains to.

2 Q. So, you turned that report over to Neal McAlpin,
3 right?

4 A. Neal McAlpin, yes.

5 Q. You did not return the report over to Lionel
6 Barrett, did you?

7 A. I don't know if I did or didn't. It was filed
8 with the clerk of the court so it is a public record. It
9 is filed with the case file.

10 All our discovery responses except in the
11 most unusual and rare circumstances where it would
12 contain a statement of a defendant that would be
13 ordinarily publicized and cause prejudicial publicity,
14 all discovery responses are filed with the court. Even
15 thought it says informal discovery is encouraged.

16 To protect ourselves, we filed discovery
17 responses with the court, and all the defense bar knows
18 that.

19 When lawyers take over cases from other
20 lawyers, they know to go to the Clerk's Office and obtain
21 the discovery there.

22 Q. You have no reason to believe you turned this over
23 to Mr. Barrett, this lab report?

24 A. I don't have any recollection whether I did or
25 didn't. I don't know.

1 Q. Okay.

2 A. Right now as I am sitting here testifying, I don't
3 know.

4 Q. Now, there were no eyewitnesses to this assault
5 other than Devalle Miller. Of course Norma Norman was
6 there and survived but she didn't see who the assailant
7 was?

8 A. I think her testimony speaks for itself. I think
9 whatever she saw she testified to.

10 Q. Her testimony was that --

11 A. Devalle Miller and James Lee Jones.

12 Q. Yes, but her testimony was she didn't see the
13 assault?

14 A. Whatever her testimony is is what it is.

15 Q. So one of the reasons you were interested in
16 getting the testimony of Devalle Miller, you needed an
17 eyewitness to the assault, correct?

18 A. Well, that could be one reason. Another reason is
19 when you have co-defendants they always want to point the
20 finger at each other.

21 So, I felt like we needed to make sure
22 that we explored that evidence and brought that person to
23 justice.

24 Q. Mr. Zimmermann, look if you will at Exhibit 42.

25 A. Okay.

- 1 Q. Tell us what this is?
- 2 A. It says memo to Eddie Barnard, team leader, from
3 John Zimmermann dated March 24, '87.
- 4 Q. Turn to page two. What are the last two lines on
5 the bottom of that page? Read them?
- 6 A. The last two lines? She is certain that Jones did
7 stabbing through sounds, that Miller was too scared to
8 move.
- 9 Q. Do you see the type it says a Ms. Norman did not
10 actually see Jones stab the deceased or herself?
- 11 A. Right.
- 12 Q. Right above that it has Roman numeral two. What
13 does that say?
- 14 A. Weaknesses in the case.
- 15 Q. Okay. Now, you had problems with your blood
16 evidence, did you not?
- 17 A. I don't remember.
- 18 Q. Let me see if I can refresh your recollection.
19 Turn to Exhibit Number 2.
- 20 A. Two?
- 21 Q. Right.
- 22 A. Okay.
- 23 Q. Now, do these appear to be notes of Detective
24 Garafola?
- 25 A. I don't know.

1 Q. Turn to the third page there of date stamp number
2 220.

3 Do you see the fourth line from the bottom
4 handwritten there where it says blood splatter on?

5 A. Yes.

6 Q. Okay. And turn over to the next page date stamped
7 221.

8 Do you see the diagram there?

9 A. Yes.

10 Q. Do you see near the stick figure on the floor
11 there where it has blood stain and arrows pointing to the
12 kitchen bar?

13 A. I see the arrows, yes.

14 Q. Turn over to page date stamped 224 up at the top
15 of the page.

16 Do you see where it says couch to right
17 wall blood on cushions, the word -- though I don't know
18 what that is -- blood stained floor.

19 Do you see that?

20 A. Yes.

21 Q. Now, this document was not turned over to Mr.
22 Barrett, was it?

23 A. I don't know.

24 Q. Look at Exhibit Number 3.

25 Do you see the first page there of what

1 this is, supplemental report, police report?

2 A. That is what they call it, a supplemental report.

3 THE COURT: Which exhibit are we on?

4 MR. REDICK: We are on Exhibit Number 3.

5 THE COURT: Okay.

6 Q. And the reporting officer here is Mark Garafola?

7 A. Yes.

8 Q. The paragraph begins at the bottom of the page
9 says, I entered 8568 Kirkwood and observed the couch to
10 the right of the door. The cushions for the couch were
11 disarrayed. One of them had a large blood stain on it.
12 There were also blood stains on the floor near the
13 couch?

14 A. Okay.

15 Q. Do you see that?

16 A. Yes, I see it.

17 Q. Look on the next page date stamped 1056. Sixth
18 line down in the middle the sentence begins and says, I
19 also observed a large amount of blood spattering on
20 items near the victim. It was on the walls, bar and
21 divider?

22 A. I am sorry. I don't see where you are reading
23 from.

24 Q. Sixth line from the top?

25 A. Okay.

1 Q. I also observed a large amount of blood spattering
2 on the items near the victim. It was on the walls, bar
3 and divider?

4 A. Okay.

5 Q. Now, this police report was not turned over to Mr.
6 Barrett, was it?

7 A. I don't know.

8 Q. Now, you had a statement from Shonta Norman.

9 Do you recall that, Norma Norman's
10 daughter?

11 A. It seems like I remember the kids were
12 interviewed.

13 Q. Look at Exhibit Number 6. Look at the second page
14 of the statement date stamped 1102.

15 This is Shonta Norman saying the man in
16 the Army jacket was tearing paper and throwing stuff all
17 over the floor and tearing the pillow up?

18 A. Okay.

19 Q. Do you know or recall this portion of her
20 statement where she is describing him over by the sofa
21 pulling the cushions off the sofa?

22 A. No, I don't remember this.

23 Q. You don't?

24 A. No.

25 Q. Did you take this statement?

1 A. No.

2 Q. Who took the statement?

3 A. Well, this would -- the police would have done
4 this.

5 No, I never talked to the children, I
6 don't believe.

7 Q. You wouldn't dispute the fact this statement came
8 from your file, would you?

9 A. No. No. This would be part of the police
10 report.

11 Q. Now, you all were under the impression as this
12 investigation began after Jones had been taken into
13 custody that he had blood stains on the clothes he had
14 been wearing that night, were you not?

15 A. Under the impression?

16 Q. Yes.

17 A. I think when you have a murder with this much
18 blood splatter, you would think some would have gotten on
19 the defendant, yes.

20 Q. Look at Exhibit Number 7.

21 A. Okay.

22 Q. Now, there is another report by Detective Mark
23 Garafola.

24 If you look at the seventh line from the
25 top?

1 A. Seventh from the top?

2 Q. Do you see where it says also found in the bedroom
3 was a pair of men's blue work pants that appeared to have
4 blood stains on them?

5 A. Okay.

6 Q. And this is a report prepared by Dr. Garafola?

7 A. Dr. Garafola?

8 Q. Detective Garafola during the execution of a
9 search warrant at James Jones' apartment, right?

10 A. Let me read it for just a second. Yes.

11 Q. Now, look at Exhibit Number 12.

12 A. There is one mistake in this report. It refers to
13 Detective Womack and Elmore and implies Cheryl Blackburn
14 was the detective.

15 She was an assistant DA working on the
16 case kind of from the investigative end when the case
17 first broke. She handled the case before I did.

18 I just wanted you to know she was not a
19 detective.

20 Q. She was present during the execution of the search
21 warrant?

22 A. Well, according the this report. I don't have any
23 knowledge it was. I am reading the report and I just
24 didn't want -- where it said detective. I didn't want
25 the judge to think Cheryl Blackburn was a detective.

1 Q. It appears she was there during the search
2 warrant?

3 A. Yes.

4 Q. She was working as an Assistant District Attorney
5 General at the time?

6 A. Yes.

7 Q. Look at Exhibit Number 12 again.

8 A. Okay.

9 Q. Thumb through there. I think it is date stamped
10 430.

11 This is a lab request, a request for a lab
12 examination to the Tennessee Bureau of Investigation. Do
13 you see that?

14 A. Yes.

15 Q. All right. Do you see down there the description
16 of the evidence, the first item listed there?

17 A. Pair of mens' blue work pants.

18 Q. What does it say beside that?

19 A. Blood stain.

20 Q. Do you see who prepared this request for
21 examination?

22 A. Detective Garafola.

23 MR. MACLEAN: Just to make the record
24 straight, I think it was date stamped 490.

25 THE COURT: You just took the question out

1 of my mouth.

2 MR. REDICK: I am sorry.

3 THE COURT: I have seen that document
4 before.

5 MR. REDICK: I think I made that mistake
6 before.

7 THE COURT: All right. I have read it and
8 follow it. It appears to be triple zero 490 as part of
9 the Exhibit 12.

10 MR. REDICK: Yes. And the testimony that
11 we have was the first pair of men's blue work pants,
12 blood stain. It indicated 801 Inverness, which was the
13 defendant petitioner's apartment at the time.

14 And then, Your Honor, two pages over from
15 that is date stamp 492.

16 Q. Mr. Zimmermann, this is another request for
17 examination, is it not?

18 A. Yes.

19 Q. It is handwritten. It is prepared by Detective
20 Garafola, correct?

21 A. Yes.

22 Q. And this is a request for a blood sample to be
23 taken from James Jones, right?

24 A. Request that a blood sample be taken from him.

25 Q. Yes.

1 A. I think the sample was already taken. This was a
2 request it be examined.

3 Q. Okay. Look down where it says description of
4 evidence.

5 A. Eight tubes of blood.

6 Q. Is that an eight or three?

7 A. Oh, it could be a three, yes.

8 Q. Tubes of blood, James L. Jones, Junior?

9 A. Taken at General Hospital.

10 Q. Excuse me?

11 A. Taken at General Hospital.

12 Q. So Detective Garafola checked Mr. Jones out of the
13 jail and took him to General Hospital and they extracted
14 blood for comparison?

15 A. He would have had a search warrant to do that,
16 yes.

17 Q. So at the time he escorted Mr. Jones over to the
18 jail he was under the impression he had recovered
19 pants from his apartment that had blood stain on them,
20 right?

21 A. I didn't know I was supposed to be looking at the
22 dates here. Just a minute.

23 The first one is dated 2-21. The next one
24 is 2-25. I don't know when blood was taken and the
25 search was.

1 But are you asking me to swear whether or
2 not the tubes --

3 MR. BAKER: I object to that question. He
4 is asking this witness what Detective Garafola thought.

5 THE COURT: Sustained. I agree.

6 Q. If you know?

7 A. It has been a long time, Mr. Redick. It is hard
8 to remember.

9 Q. Okay. Mr. Zimmermann, on that same document below
10 the description of the evidence, I can't read what the
11 type print says but it says type and compare to stamps on
12 victims' clothing and clothing recovered from Jones.

13 A. Back on page 492?

14 Q. Yes.

15 A. Okay.

16 Q. Does that not suggest that those items had been
17 seized prior to the taking of the blood sample?

18 A. It could have been. I am not arguing with it.
19 You are asking me as if I was thoroughly familiar with
20 when the sequence of evidence was taken. I don't know.
21 I guess you could certainly adduce that.

22 Q. I was asking you what that meant to you in this
23 document here?

24 A. That is the first time I have seen it in a long
25 time.

1 Q. Okay. Now, look at Exhibit Number 19. Tell us
2 what this is.

3 A. State of Tennessee versus James Jones supplemental
4 response to number two to defendant request for
5 discovery.

6 Q. Who prepared that?

7 A. I signed it.

8 Q. And there is a certificate of service to whom?

9 A. Neal McAlpin.

10 Q. Now, look if you would at the next page which is
11 date stamped 552.

12 A. Okay.

13 Q. In summary this is a report back on the blood
14 comparison test at the Tennessee Bureau of Investigation,
15 is that right?

16 A. Yes.

17 Q. They were examining two pairs of blue work pants
18 and a black coat seized from Mr. Jones' apartment and the
19 test results indicate there was no blood stain on any
20 item, blood on either the pants or black coat, is that
21 correct?

22 A. Oh, gee. Let me see here. Exhibit number three,
23 Exhibit 4, work pants. Failed too indicate.

24 Six, black coat. Failed to indicate.

25 Number 11, the knife. Human blood.

1 Number 12, the blue jeans from Norma
2 Norman. They had blood.

3 What is your question? I am sorry.

4 Q. My question is that this report indicates that
5 there was no blood on any of the items seized from Mr.
6 Jones' apartment?

7 A. Yes, that is correct.

8 Q. Look at Exhibit 42?

9 A. Exhibit number what?

10 Q. Forty two. Look at this. And this is your report
11 to Eddie Barnard the team leader on the case?

12 A. Yes. It is kind of a working document as we are
13 moving the case, in making a decision in the office.

14 It is kind of like where are we now and
15 what do we know at this point.

16 Q. Look at page two and you see Roman numeral two,
17 weaknesses in the case?

18 A. Okay.

19 Q. Turn the page over and look at subparagraph C
20 there?

21 A. Yes.

22 Q. It says TBI Lab report was unable to find any
23 blood staining on the black dark coat by Jones?

24 A. Yes.

25 Q. Blood spattering all over the cushion. Do you see

1 that?

2 A. Yes.

3 Q. You identified that to Mr. Barnard as a weakness
4 in the case?

5 A. Well, that is what it is listed under, that
6 subcategory, yes.

7 Q. So, therefore, that is favorable to the defendant,
8 is it not?

9 A. Well, it may or may not be.

10 Q. How could it not be?

11 A. When I am talking about weaknesses in the case,
12 this is something we will have to explain what I mean.

13 If I am prosecuting the case, and I am not
14 debating whether it is exculpatory or not, when I refer
15 to something as a weakness of the case, when I take a
16 case -- I don't care what kind of case it is -- I first
17 start out with the viewpoint of if I was going to defend
18 this case, how would I create reasonable doubt.

19 Q. Mr. Zimmermann, was --

20 A. Yes, I think it is something that is favorable.

21 Q. Now, did you turn this over to Mr. Barrett, this
22 information?

23 A. Well, it was turned over to the defense. I mean,
24 obviously we looked at two discovery responses where all
25 this is part of the discovery.

1 Q. Was it turned over to Mr. Barrett?

2 It was turned over to Mr. McAlpin.

3 A. I don't know. I do know that -- well, it was
4 filed with the court. It was never kept from Mr.
5 Barrett.

6 Q. Let's look at Exhibit 46. Can you tell us what
7 this is?

8 A. A letter to Mr. Lionel Barrett dated March 30,
9 1987.

10 Q. From whom?

11 A. From myself.

12 Q. In the first paragraph it says I received a copy
13 of your form discovery request and would advise you we
14 have previously responded to a similar request to the
15 defendant's previous counsel both in an initial response
16 and supplemental response number one. Those are both
17 filed with the court and Neal McAlpin also has the
18 defendant's copies.

19 If you want us to photocopy those for you
20 and submit them to you, we will be happy to do so.

21 Did he ever request you to photocopy those
22 and provide those?

23 A. I don't remember.

24 Q. You don't recall he did, do you?

25 A. I can't say he did or didn't. With Mr. Barrett

1 everything was --

2 Q. You don't recall he did?

3 A. That doesn't mean -- I don't want the judge to
4 think he didn't do it.

5 Q. He was --

6 MR. BAKER: He should be able to answer
7 the question.

8 THE COURT: Yes, I get the gist of it.
9 Mr. Zimmermann has no memory of it.

10 Q. Look at the last paragraph that begins at the
11 bottom of the page.

12 A. With regard to possible Brady material?

13 Q. Yes.

14 Read that paragraph to yourself. Just
15 read it to yourself and see if you know what that
16 means.

17 A. Okay.

18 Q. Basically you're saying you have no Brady
19 material, is that correct?

20 A. That's correct.

21 Q. Okay.

22 A. Other than what I qualify which is the Sam
23 Blackstock thing. That is what he made a specific
24 request for.

25 Q. He made a specific request for what?

1 A. It says you requested information regarding the
2 involvement of another suspect. That was the subject of
3 the Brady request.

4 Q. But then you said you don't know of another
5 suspect or know of any Brady to turn over?

6 A. The letter speaks for itself.

7 Q. That is what the letter says?

8 A. I address the Sam Blackstock.

9 Q. You see on the second page of the letter on the
10 second line you do -- you see the sentence that says we
11 know of no other Brady material regarding the involvement
12 of the other suspect?

13 A. Yes.

14 Q. And so in the rest of the paragraph you don't
15 refer to any other Brady information?

16 A. The request had to do -- this is responding to a
17 direct request from Mr. Barrett. Whether that was in
18 writing or something he mentioned to us when he saw me in
19 the hallway or office or called, that is what he is
20 trying to figure out.

21 That is responding to a direct request
22 that Mr. Barrett must have made, whether orally or in
23 writing.

24 Q. You testified earlier, Mr. Zimmermann, that you
25 have an obligation to turn over Brady material

1 independent whether it is requested or not?

2 A. I believe that is the law.

3 Q. Look at Exhibit 62.

4 THE COURT: That is in a different
5 binder?

6 MR. REDICK: Yes, sir.

7 A. All right.

8 Q. Tell us what this is.

9 A. State versus Jones, supplemental request four for
10 defendant's request for discovery.

11 Q. Who is this prepared by?

12 A. Myself.

13 Q. And dated June 4, 1987 and a certificate of
14 service to Lionel Barrett, right?

15 A. That's correct.

16 Q. So, turn over to the next page and tell us what
17 that is.

18 A. It looks like a lab report from the FBI about soil
19 samples.

20 Q. There was some soil samples taken from the shoes
21 and pants seized from the petitioner's home and sent to
22 the FBI for testing, right?

23 A. I don't remember.

24 Q. Well, what does this report indicate?

25 A. It indicates a test on some soil samples.

1 Q. Soil from pants, soil from shoes?

2 A. Yes.

3 Q. And it indicates that could not be associated with
4 soils that they were compared to, right?

5 A. I didn't read the results. Do you want me to read
6 the results?

7 Q. First line under results of examination, specimen
8 request two and three could not be associated with K1 and
9 K2 soils?

10 A. It says exactly what you stated. I don't know
11 where the soils are coming from. I can't tell you where
12 the soil came from.

13 I don't remember the report, is all I am
14 saying.

15 Q. You do know this is a lab report result that you
16 turned over to Mr. Barrett?

17 A. Well, when a lab report would have come in to us
18 from the TBI and it is addressed to Mr. William Darby,
19 the director of the TBI Lab, apparently they sent it onto
20 the FBI.

21 When they got the report -- either
22 Detective Garafola got the report and brought it to me
23 or we received it from the TBI.

24 When it comes in, we ship it over to the
25 defense. You see, I took it and probably sent it just

1 about the time we got it. But I sent it over to the
2 defense.

3 Q. The point is, that you sent this lab report to the
4 defense but you didn't send the blood lab report to Mr.
5 Barrett?

6 MR. BAKER: We just heard testimony and
7 saw reports he did. This is a mischaracterization.

8 THE COURT: I agree with Mr. Baker. He
9 sent it to Mr. McAlpin.

10 If you want to ask him if he sent it to
11 Mr. Barrett, that is fine. The witness did testify he
12 sent it to Mr. McAlpin based upon the certificate of
13 service.

14 MR. REDICK: Right, Your Honor.

15 Q. And I think we established earlier you were
16 anxious to get Devalle Miller as a prosecution witness?

17 A. I wasn't anxious to get Devalle Miller as a
18 prosecution witness. I was anxious to get him in custody
19 and put on the trial with James Lee Jones.

20 I felt he was an accomplice that needed to
21 be hunted down in a brutal, brutal murder.

22 Q. You recommended that a deal be struck with General
23 Zimmermann that this --

24 THE COURT: I am confused. This is
25 General Zimmermann.

1 Q. You recommended to General Barnard that a deal be
2 struck with Mr. Miller and he be called as a witness for
3 the state?

4 A. Yes, I recommended that. Recommended to whom, did
5 you say?

6 Q. General Barnard?

7 A. I am sure Eddie and I talked about it. The
8 judgment call on that would be made by General Shriver,
9 the DA, as to whether or not an agreement would be
10 reached.

11 Eddie and I would have talked about it and
12 I may have said, hey, this is what I think we ought to
13 do.

14 But he is not the one that would have made
15 the decision.

16 Q. Look at Exhibit Number 42.

17 A. Okay.

18 Q. Look at page three.

19 A. Is that --

20 Q. The top of the page.

21 A. Page 679?

22 Q. 678. Do you see the top of the page, we must
23 decide what to do with Miller? I recommend we severe
24 this case from Jones and let him testify?

25 A. Yes, I see it. I just want to make it clear it

1 wasn't Eddie Barnard that makes the decision in a case
2 like that. It would be a decision he would say, yes, we
3 will go talk to the boss together.

4 Q. Is that your practice, Mr. Zimmermann, to
5 interview charged defendants without their attorney
6 present?

7 A. No, I don't have a practice of doing that.

8 Q. And it is your recollection that you did not
9 interview Devalle Miller without his attorney present in
10 this case, is that correct?

11 A. Really, I don't have a memory. I know when we did
12 the deposition, you asked me about that and I was under
13 the belief the first time I spoke with Devalle Miller
14 when we were getting him ready for trial that there was a
15 transcript, a taped conversation apparently when Devalle
16 Miller was just brought in from Pennsylvania he was
17 extradited.

18 He waived his extradition. Detective
19 Garafola apparently checked him out of jail to interview
20 him in his office. So there was an interview
21 immediately.

22 That is a result of numerous phone calls
23 from his wife in Pennsylvania, may have been a result of
24 contact by Mr. Miller himself.

25 Q. You testified at the deposition you would not

1 interview a defendant without his attorney present?

2 A. Sure. If he is charged, of course not.

3 Q. You did interview Devalle Miller without his
4 lawyer?

5 A. He didn't have a lawyer. If I interviewed him, he
6 didn't have a lawyer.

7 Q. You knew he would be charged with this offense?

8 A. I don't want to debate. If I sat in an interview
9 with him, he did not have counsel appointed to him.

10 Q. Well, he might not have. Whether he had it or
11 not, he was brought down?

12 A. I thought you asked if he had a lawyer.

13 If that was the premise of your question,
14 would I have gone around behind a lawyer that represented
15 him, the answer is absolutely not.

16 Q. You would interview somebody charged with a murder
17 if their counsel hadn't been appointed yet?

18 A. If they are not represented by counsel and they
19 execute a waiver of counsel, absolutely.

20 Q. What is your policy about interviewing a
21 cooperating co-defendant in terms of how many times you
22 would interview him?

23 A. I don't have a policy.

24 Q. Didn't you testify in the deposition you wouldn't
25 interview someone you were anticipating to testify more

1 than once or twice?

2 A. That is a practice. If you are asking me a
3 policy, my feeling is this. If you interview and prepare
4 a witness time after time after time it is kind
5 counterproductive.

6 If you are satisfied they are telling the
7 truth asking the same story 10 times is
8 counterproductive.

9 Q. Only time you would interview him more than once
10 or twice is if you don't believe him?

11 A. I am not saying that.

12 Q. Didn't you say that at the deposition?

13 A. They might provide additional information, Mr.
14 Redick, other leads to corroborate their testimony.

15 Q. But you wouldn't use them as witnesses if you had
16 to interview them more than once or twice because that
17 indicates you don't believe them?

18 A. Give me a case and I will explain to you. If I
19 ever interviewed someone more than once, I will try to
20 explain why we would have.

21 Q. Do you recall testifying to that on the
22 deposition?

23 A. No, I do not.

24 MR. REDICK: May I approach the witness,
25 Your Honor?

1 THE COURT: All right.

2 Q. Look at page 233.

3 A. 233?

4 Q. Right.

5 A. I don't have page 233.

6 Q. It doesn't have a 233?

7 A. Unless 233 comes after 300, no, I don't.

8 Q. I am sorry.

9 THE COURT: Let's see if we have the right
10 document now.

11 Is that your deposition, Mr. Zimmermann?

12 A. Your Honor, it appears to be part of it. It
13 starts with page 256.

14 Q. Starts at 256?

15 A. Mine does. Maybe I am looking at it wrong.

16 Did you say page 233?

17 MR. REDICK: I apologize, Your Honor.

18 Maybe we have it straight now, Your
19 Honor.

20 A. Page 233? All right.

21 Q. Do you see there at the bottom of 233 the question
22 is asked, would you ever -- do you ever recall an
23 occasion where you would interview a co-defendant more
24 than once or twice?

25 Answer. Yes. When I don't believe

1 them.

2 Question. When you don't believe them?

3 Answer. Right.

4 Question. Has there ever been occasion
5 like that where you actually used them as a witness at
6 trial?

7 Answer. No. No. If I don't believe
8 them, if I don't feel like in my heart of hearts I
9 believe what this person is saying about their own guilt,
10 I don't put them on.

11 A. Right. If I don't believe a co-defendant or an
12 accomplice, they don't testify.

13 Q. Question immediately following that.

14 All right. So there would never be an
15 occasion when you would meet a co-defendant more than
16 once on twice and actually use that co-defendant as a
17 witness?

18 Answer. Not unless there is something I
19 need to follow-up, we found some other evidence.

20 What about this? As far as meeting with
21 them and trying to get another lead or finding a name or
22 something like that?

23 Do you see that?

24 A. Right.

25 Q. All right. What you're saying is that if you

1 interview them once or twice, if you feel like you need
2 to talk to them more than that then you are having
3 problems believing them, correct?

4 A. No. I said if I had to interview them more than
5 once or twice is because, in my opinion, I am trying to
6 find additional evidence, other leads, things to
7 corroborate their testimony, other information that we
8 developed in the case since our first interview.

9 If you are asking me for pretrial
10 preparation in this case, I only remember one time where
11 we had what I would call a pretrial preparation meeting
12 and that was in the presence of Mr. Alderman at the
13 D.A.'s office where we went over the facts from beginning
14 to end, and actually it was Mr. Alderman himself who
15 cross-examined his client.

16 We were talking about potential issues
17 and Mr. Alderman volunteered to cross-examine his own
18 client in front of us.

19 That was the only pretrial preparation
20 meeting that I remember.

21 Q. Do you recall meeting with Mr. Miller only
22 once?

23 A. No. I said pretrial preparation meeting.

24 Q. Once?

25 A. Yes. In the D.A.'s office where Mr. Alderman was

1 with us.

2 Q. And your testimony is that you recall meeting with
3 him without counsel when he was first brought to
4 Tennessee?

5 A. I don't recall meeting then. At the deposition,
6 you showed me a transcript, or Mr. MacLean showed me a
7 transcript that indicated -- I think the transcript
8 indicated that Detective Garafola and I interviewed Henry
9 Miller immediately after being brought here to Nashville
10 when he was placed in lockup.

11 Q. Do you remember one other time you met with he and
12 counsel?

13 A. I have memory of that one meeting in the D.A.'s
14 office either right before the trial or right after jury
15 selection.

16 Q. Do you recall that Devalle Miller changed his
17 story from the first statement to the time he
18 testified?

19 A. No, I do not.

20 Q. You don't remember any changes in his testimony?

21 A. I don't remember. No, I don't. I am not saying
22 there weren't. I just don't remember.

23 Q. When you first interviewed him, he didn't say
24 anything about a statement attributed to Mr. Jones before
25 they entered the apartment that they might have to kill

1 the witnesses or we might to have kill somebody?

2 A. I don't even remember the first statement. I
3 don't remember. I don't have a memory of it.

4 Q. So then you didn't report to Mr. Barrett about any
5 changes in his statement, did you?

6 A. Well, whatever testimony, whatever prior
7 statements Mr. Miller made would have been turned over to
8 Mr. Barrett.

9 It was Judge Kurtz' ruling that Jencks'
10 material, particularly lengthy Jencks' material was given
11 over in advance of the witness so there wouldn't be a
12 delay in the trial with the jury present.

13 So, if like the night before we had a
14 witness that we anticipated giving a lengthy statement
15 like Henry Miller, we would have to turn that over to
16 them.

17 If we had a transcript or tape, we had to
18 provide that as well so they wouldn't have to send the
19 jury out in the middle of the examination.

20 Any Jencks' material would have been
21 turned over.

22 Q. Mr. Zimmermann, if you would, let me ask you to
23 turn to Exhibit Number 7.

24 Now, I would like, if I could to direct
25 your attention to another area of proof in this case that

1 involves the mental state of the defendant James Lee
2 Jones.

3 If you would, identify for the court what
4 this is, Exhibit Number 7.

5 A. Well, it's a portion of Detective Garafola's
6 supplemental report we were looking at earlier.

7 Q. It is a portion because a portion of it is
8 redacted. You have big black lines crossing out about a
9 third or a little more of the report?

10 A. Right.

11 Q. If you turn this over the next page is the same
12 report without the redaction, correct?

13 A. It appears to be so, yes.

14 Q. This report was turned over as Jencks' material
15 during the course of the trial after Detective Garafola
16 testified on direct, is that right?

17 A. I really don't remember it. I don't have any
18 dispute about that. I think that would be right.

19 Q. That is why the redaction?

20 A. The redaction -- under the law in Tennessee you
21 are required to provide the prior statement of a witness
22 inasmuch as it relates to what he testified on direct.
23 If there are subject matters in the statement that
24 didn't cover his direct testimony that is not to be
25 provided.

1 Q. All right. Then look --

2 A. The redaction would have been made known to Mr.
3 Barrett. He would have seen it like this.

4 Q. With this portion redacted?

5 A. Yes. He would have known there was some redacted.
6 He could have had -- and sometimes what they will do,
7 they will ask the judge to look at the original to make
8 sure that there is nothing covered in the direct
9 testimony that has been improperly or erroneously
10 redacted.

11 Q. Look at the unredacted statement and the redacted
12 portion, at least beginning with the paragraph that
13 begins when he returned to our office.

14 That says as follows: When we returned to
15 our office, Detective Elmore and myself attempted to
16 interview James Jones. He was in an interview room and
17 when he entered the room, Jones was crying. He would not
18 respond to our questions. The only statement he made
19 was, I only killed one man in my life and this is because
20 he was trying to fuck me.

21 He then started to hit his head on the
22 table and then he jumped up still handcuffed to the chair
23 and banged his head against the wall. We got him under
24 control and then took him to the booking room. In the
25 booking room he started to bang his head on the wall

1 again. Detective Elmore was able to control him. We
2 took Polaroid pictures and also mugshots with his glasses
3 on and off?

4 A. Right.

5 Q. Now, does this not reveal something about his
6 mental state at the time he was taken into custody?

7 A. What it reveals about when he was taken to booking
8 if he has any lumps on his head, the officers are
9 protected by documenting it was self-inflicted rather
10 than done by the police. That is why they took the
11 Polaroid pictures, so he couldn't claim that the police
12 hurt him or that any later injuries he got in the jail
13 came from the police.

14 That was the purpose for them signing
15 this, so they couldn't be sued.

16 Q. It was your opinion that this doesn't indicate
17 anything about his mental state at the time of being in
18 custody?

19 A. No. When people are innocent or guilty and
20 confronted with their guilt, they are freighted, they
21 bang their fists on the tables, they -- I mean --

22 Q. So, your answer is no?

23 A. The answer is no. Particularly when you look at
24 his oral response to what he is actually saying. He is
25 coherent, responsive, directing himself to the issues.

1 He is not out of his mind not lost control. He is just
2 angry, frustrated.

3 Q. You are not a psychiatrist, are you?

4 A. No.

5 Q. Look at Exhibit Number 8. Now, this is a
6 classification interview by the Davidson County Sheriff's
7 Office.

8 This is what they fill out on the intake,
9 right?

10 A. I don't know. I wouldn't dispute that.

11 Q. Turn over to the --

12 A. I don't deal with these forms and I never see
13 them.

14 Q. You don't see the forms?

15 A. Hardly ever. They are not part of the police
16 report that comes to our office, Mr. Redick.

17 Q. They end up in your files on cases you prosecute,
18 do they not?

19 A. Rarely. Only when we may specifically request
20 them. The classification of when they go -- or go in the
21 jail doesn't come to the D.A.'s office.

22 The Sheriff's Office is separate and apart
23 from the police department. The Sheriff maintains the
24 jail. He has nothing to do with the prosecution or the
25 investigation.

1 Q. All right. Look over at page four of this
2 document where it says incident report. If you will look
3 at the last two lines of the details of the incident,
4 have you found it?

5 A. Yes.

6 Q. And the action taken. What that reveals is he was
7 placed on suicide watch because he was beating his head
8 against the floor in the presence of Reverend Turner,
9 correct?

10 A. I haven't read the document, Mr. Redick. Do you
11 want me to read the document?

12 Q. If you would.

13 MR. BAKER: Unless he is going to
14 demonstrate this witness has personal knowledge of the
15 record, it seems like we are having the witness read
16 records that he is not familiar with.

17 THE COURT: We need to stab whether he has
18 seen it before and if he hasn't seen it before you can
19 ask him why not and you can ask him if he had any
20 obligation to see it, why or why not. If he had known
21 about it or what would have happened.

22 He testified that he doesn't see these as
23 a matter of routine.

24 It is not clear to me whether he may have
25 seen this document or if he did whether he would have

1 memory of it.

2 MR. REDICK: Let me ask him this question,
3 Your Honor.

4 Q. Whether you have ever seen this document or not,
5 does this document not indicate to you that this head
6 banging had some mental state significance?

7 MR. BAKER: Your Honor --

8 THE COURT: I sustain that. That is
9 exactly why Mr. Baker objected. This witness' opinion
10 about somebody else's document when he is not an expert
11 on mental illness or mental health has no probative
12 value.

13 Q. If you would, Mr. Zimmermann, look at Exhibit
14 Number 9.

15 Let me ask you, did you have this document
16 in your file?

17 A. Mr. Redick, I don't know if we did or not. I will
18 say this, to address the judge's comments before. In a
19 death penalty case, we try to get everything we can.
20 That includes in a death penalty case checking over at
21 the Sheriff's Office to see whether or not he has had a
22 record of misconduct and things like that.

23 In a death penalty case that would be the
24 only time we would go to the Sheriff's Office, to see
25 what happened while he was in jail.

1 I don't know if I got this document or
2 not. I don't have any memory of it. It would have been
3 in our file. You all have had free access to our files
4 so if you found it in the file then, yes, we did.

5 Q. Are you referring to Exhibit 8 or 9 or both of
6 them?

7 A. Well, I am on Exhibit 8 -- I am sorry, Exhibit 9.
8 I am on Exhibit 9. That has this progress note thing.

9 There are two Exhibit 9s in the book, or
10 at least two Exhibit 9 tabs. It says progress notes.

11 Q. And these are progress notes by two psychologists
12 that examined Jones and recommended he needed to be
13 evaluated.

14 Are you aware of that?

15 A. I am just now looking at it.

16 It looks like some signature and I can't
17 make out what it is.

18 Q. Do you recognize these?

19 A. What?

20 Q. These documents.

21 A. No.

22 Q. Look then at Exhibit Number 42.

23 A. Okay.

24 Q. And look at page three.

25 A. Okay.

1 Q. Do you see down at the bottom of the page --

2 THE COURT: Date stamp 678?

3 MR. REDICK: Yes.

4 Q. It says defendant Jones' mental condition?

5 A. Uh-huh.

6 Q. Defendant Jones is just plain weird?

7 A. Right.

8 Q. He has a long history of institutionalization in
9 prisons and at every juncture seems to be shrunk two or
10 three different ways?

11 A. Yes, I see that.

12 Q. Turn over to the next page and you see the second
13 full paragraph.

14 Do you see where it says I have received a
15 copy of a transcript of the defendant's first trial where
16 he pled not guilty by reason of insanity?

17 A. Right.

18 Q. So, you are now on notice that there are questions
19 about this defendant's mental state, right?

20 A. Questions? He has an antisocial personality.
21 That is what I mean by he is weird.

22 Q. This doesn't indicate that there are questions
23 about his mental state?

24 A. Sure. Every time he gets in trouble. That is
25 what I was trying to convey. He had been shrunk. Every

1 time he gets in trouble he is shrunk, examined.

2 MR. REDICK: If we could, I would like
3 Exhibit 131 to be provided Mr. Zimmermann.

4 THE COURT: All right.

5 Q. I will ask you if you would, Mr. Zimmermann, if
6 you can identify this as the record of the 1972
7 conviction you had in your file that you referred to in
8 this report to Mr. Barnard?

9 A. Well, I mean, I will accept your word. I have not
10 been asked, Mr. Redick -- I don't know.

11 I don't have any reason to doubt it, if
12 you say it is so.

13 Q. Let me try to help you. Look at the third page.
14 It says 1972 offense?

15 A. Okay.

16 Q. Do you see this? That is a tab on a file from
17 your file, is it not?

18 A. It's not my writing. I don't know.

19 Q. Did you not have the transcript of the 1972
20 conviction in your file?

21 A. Yes. I asked for it. I called the United States
22 Attorney. I think there is correspondence in our file
23 that shows how I obtained it.

24 Q. Look at this transcript page on the evidence.
25 What is that?

1 A. Date stamp 722?

2 Q. Correct.

3 This states, United States of America
4 versus James Lee Jones, CR 57-72-R, Richmond, Virginia,
5 September 11, 1972, before Honorable Robert R. Merhige,
6 Junior.

7 This is transcript of the evidence from
8 that trial?

9 A. If you say so. I don't have any reason to doubt
10 it. I haven't seen this document before today.

11 Q. You had this in your file, did you not, Mr.
12 Zimmermann?

13 A. We had the transcript of the -- transcript in the
14 file.

15 Q. This is a copy of the transcript?

16 A. I haven't looked at it.

17 Q. Look at it.

18 A. I thumbed through it. I can't say it is
19 complete. If you got it from the file, you got
20 everything we had in our file. I don't dispute that.

21 Q. Now, there was testimony in this trial from two
22 psychiatrists among otherwise?

23 A. I don't remember that.

24 Q. You don't remember any psychiatric testimony in
25 this trial?

1 A. You are talking about the one in federal court or
2 state court?

3 THE COURT: One moment, please. Where is
4 Mr. Rahman?

5 MR. MACLEAN: Your Honor, he had to go to
6 the men's room.

7 THE COURT: Well, unfortunately about this
8 process, somebody needs to bring it to my attention.

9 MR. MACLEAN: I am sorry.

10 THE COURT: Under any reading of the
11 facts, he has been convicted of killing two people.

12 We don't allow people who are under a
13 death sentence to wander the halls.

14 MR. MACLEAN: He is with the guard. I
15 apologize.

16 I will go back and bring him back in.

17 THE COURT: This is a very serious
18 matter. I am not sure he has a constitutional right to
19 be present in habeas proceedings. Certainly if it was a
20 crime that proceeding -- he would have a right to be
21 here. If he doesn't have a right to be here, we are into
22 constitutional error with him wandering the halls with or
23 without a guard.

24 Court will stand in recess. I want to
25 hear an explanation why he is not here.

1 MR. MACLEAN: I apologize, Your Honor.

2 (Whereupon, the hearing was in recess.)

3 THE COURT: All right. Let's hear why Mr.
4 Jones just gets up and walks out.

5 MR. MACLEAN: I apologize to the Court.
6 Mr. Jones and the guard asked if it would be okay for him
7 to go back and go to the rest room. I should have
8 brought it up to Your Honor's attention. I didn't. I
9 apologize. I gave him permission to do that.

10 THE COURT: Let me make it real clear, if
11 Mr. Jones needs a bathroom break, he needs to ask for one
12 and he will get one. I can't conceive that I would not
13 allow someone to get up and go to the bathroom.

14 But neither Mr. Jones, none of the
15 lawyers, none of the witnesses need to just get up and
16 leave court in the middle of a proceeding. I am
17 extremely unhappy about that. For better or worse, I am
18 in charge, not you.

19 MR. MACLEAN: I understand, Your Honor. I
20 apologize to the Court. I understand. It is entirely my
21 fault.

22 THE COURT: Mr. Redick, continue your
23 questions.

24 BY MR. REDICK: (Continuing)

25 Q. Referring once again to the transcript of the 1972

1 trial, if you look at page 423 which would be date
2 stamped 763, do you see this is the beginning of the
3 testimony of Dr. Asot Masri? He is a psychiatrist.

4 A. Yes.

5 Q. With regard to that testimony, can you turn to
6 page 47 date stamp 767?

7 A. Okay.

8 Q. And at line 11, do you see where it says, my
9 conclusion after I sat and talked with him, this is
10 basically a schizoid human being, a loner, never felt
11 close to anybody, always rebelled to authority?

12 A. Okay.

13 Q. Down to line 21 it says, so, we consider this as
14 an illness. So in that answer, he is a sick man.

15 A. Okay. I see that.

16 Q. Look over on page 48 continuing on his testimony
17 at the top of the page.

18 A. All right.

19 Q. Do you see, we know homosexuals have a tendency
20 for violence. We know when they panic, they lose
21 control?

22 A. I am sorry. Where is that?

23 Q. Very top of the page.

24 A. We know homosexuals have a tendency for violence.
25 We know when they panic, they lose control.

1 Q. Do you see that?

2 A. I see that. I don't remember any of that.

3 Q. This was in your file, correct?

4 A. Yes. If you are asking if I remember this, no.
5 I think people would be laughed at right now if they
6 said all homosexuals have a tendency for violence and
7 panic.

8 I think that is the thinking probably in
9 '72.

10 Q. This is what the psychiatrist said in the
11 testimony in your file?

12 A. I am saying it would be laughed at today, is all I
13 am saying.

14 Q. Look at page 52 and line six. The question is,
15 well, what I am getting at is are you basing what you're
16 saying is a disease on as a result of the defendant can't
17 control himself when he panics?

18 Answer. Exactly.

19 Question. All right. So what you're
20 saying is that he cannot control himself when he panics?

21 Answer. Nodding affirmatively.

22 Question. And that is a disease, in your
23 mind?

24 Answer. Yes?

25 A. The psychiatrist's mind?

1 Q. Right.

2 A. Right.

3 Q. Okay. Now, if you would look at page 54?

4 A. 54?

5 Q. Correct. Which is date stamped 774?

6 A. Okay.

7 Q. Do you see there where the testimony begins of Dr.
8 Robert Jack Eardley?

9 A. Yes.

10 Q. Do you understand that this is a psychiatrist
11 called by the government in this case?

12 A. It appears to be so, yes.

13 Q. Now, if you would, look at page 61, date stamp
14 781.

15 This is testimony from the government
16 psychiatrist. Beginning at the top of the page it says,
17 he indicated to me that he would try to work out
18 something with this Stein.

19 Michael Stein was the victim in this case,
20 do you recall?

21 A. I don't remember.

22 Q. And did go down there to talk to him in his cell.
23 And Stein put him off and laughed at him and I think
24 Jones lost his temper and got very angry at this
25 situation.

1 I think we all would be angry in
2 situations that for momentarily we don't realize what we
3 are doing, is that what you're saying?

4 Answer. Well, I think you know a
5 temporary period that for a fleeting second at times we
6 forget. And that is conceivable.

7 You are in such a state. You are so
8 angry, you don't think at that moment.

9 Question. Not that that would be
10 considered temporary insanity, would it not?

11 Answer. Well, I don't know.

12 The court. I am sorry. I didn't hear
13 your answer, doctor. What was your answer?

14 The witness. I said, I don't know.

15 The court. You don't know?

16 This is the government's psychiatrist.

17 You had this in your file and you didn't
18 turn it over to Mr. Barrett, did you?

19 A. No.

20 Q. Now, you prosecuted the case. You were persuaded
21 James Jones was the assailant in the case, is that
22 correct?

23 A. That is what I believe the evidence showed, yes.
24 I think that is what he testified to.

25 Q. You were familiar with the Graham test of

1 insanity, right?

2 A. Yes.

3 Q. You are familiar with the volitional problem of
4 the Graham test?

5 In layman's terms in Tennessee in 1987 if
6 a person as a result of a mental disease or defect losses
7 control, he could be not criminally responsible and
8 insane, correct, under the Graham test?

9 A. Losses control? If he was unable to appreciate
10 the wrongfulness of his conduct or unable to perform to
11 conduct to the requirement of the law, I think it is
12 different than just losing control.

13 Q. Okay, look at Exhibit 46.

14 A. Okay.

15 Q. Do you see the 4th paragraph in the letter?

16 What is this document?

17 A. I think I already testified this is the one I
18 previously testified to, wasn't it?

19 Q. Yes.

20 A. Yes.

21 Q. What is it?

22 A. A letter dated March 30, 1987.

23 Q. To Mr. Barrett from you?

24 A. Exactly.

25 Q. And the fourth paragraph says, with regard to the

1 defendant's past report, I have the information regarding
2 the previous convictions, specifically the judgment of
3 convictions.

4 So now that says that you are telling him
5 that you have the judgment of convictions but suggests
6 that is all you have?

7 THE COURT: What document are we on?

8 MR. REDICK: Exhibit 46, a letter from Mr.
9 Zimmermann to Mr. Barrett dated March 30, 1987.

10 THE COURT: I am looking at it.

11 Q. And the fourth paragraph says, with regard to the
12 defendant's past record, I have the information regarding
13 his previous convictions, specifically the judgment of
14 convictions. And you may receive copies of those when
15 you come and inspect tangible evidence. I believe those
16 have already been made available to his previous counsel,
17 but I will be happy to copy them again for you.

18 You are referring here to judgments of
19 convictions?

20 A. That is what the letter says.

21 Q. You're not referring to the transcript of the
22 trial?

23 A. No.

24 Q. You didn't tell him about the transcript of the
25 trial and you didn't provide him with the transcript of

1 the trial?

2 A. There are two questions there. One is I never
3 provided him with the transcript of the trial. I don't
4 know that I had the transcript of the trial at this
5 time.

6 The judgments of convictions, the Clerk's
7 Office usually keeps those on file.

8 If you want indictments or transcripts,
9 they have to write off to archives and you have to jump
10 through a whole lot of hoops to get that stuff.

11 I don't have a memory today when I got the
12 transcript. It should have been in my file somewhere,
13 some correspondence to that.

14 I know we had to get permission from
15 several people to try to get this information. I don't
16 know when it was.

17 Q. Look down at the last paragraph on the second page
18 of the letter.

19 A. Okay.

20 Q. You are referring there to a letter that Mr.
21 Barrett had written to you. You said, finally, as your
22 letter mentions, you hinted the fact you may be filing a
23 notice of a defense of insanity.

24 A. Yes.

25 Q. You knew that Mr. Barrett was entertaining the

1 possibility of presenting mental state evidence?

2 A. Whatever it is, I don't have the letter in front
3 of me. Whatever he said in his letter is what I would
4 respond to.

5 I am sure by this time Mr. Jones -- it is
6 a matter of course when someone is standing trial for a
7 case they are always evaluated by the court. I am sure
8 Mr. Jones was already evaluated. Whether Mr. Barrett
9 chose to use those results or any other results as a
10 defense, you know, we wouldn't know until whatever he
11 sent us in the letter.

12 Under Tennessee law you are required to
13 file a notice that you are going to rely upon the defense
14 of insanity. That puts the state on notice so we can
15 prepare possible rebuttal.

16 I think what I was just trying to say, I
17 didn't want him to assume whatever he wrote in that
18 letter was going to be considered by us to satisfy the
19 requirements of the rules of procedure.

20 Q. But it is recognized by you that there had been
21 some letter from him to you mentioning the possibility of
22 relying on a mental state defense?

23 A. You hint at the fact you may be filing a notice.

24 Q. Right.

25 Look at Exhibit Number 51. That cover

1 page is a copy of a file from an internal file in your
2 file, is that correct?

3 A. Yes.

4 Q. And it contains the statement taken from Devalle
5 Miller?

6 A. I would assume so, yes.

7 Q. So this exhibit then is a copy of your file and it
8 also has the statement, correct?

9 A. I am looking now at a transcript and memorandum.

10 Q. Look over at page 171, date stamped, and this is
11 in Devalle Miller's statement in your file?

12 A. Okay.

13 Q. You were present when this statement was taken, is
14 that right?

15 A. Yes.

16 Q. And you see down -- two thirds down -- the date
17 stamp 171 -- where the last two lines of an answer
18 Devalle Miller says, I was just trying to stay calm
19 because I was riding a uh-uh to what I perceived as a
20 maniac, referring to Jones?

21 A. We are on page 171, right?

22 Q. Right.

23 A. Where.

24 Q. Look the third --

25 A. I see it now. I was just trying to stay calm

1 because I was riding what I perceived as a maniac.

2 Q. Look to the right. Whose handwriting is that?

3 A. Eddie Barnard.

4 Q. What does it say?

5 A. Insanity maybe a plus mark and mitigating factor.
6 Question mark.

7 Q. What does that mean?

8 A. That means there is a possibility this guy is
9 going to raise an insanity defense or raise a mental
10 defense as a mitigating factor.

11 Q. That statement was not turned over to Mr. Barrett,
12 was it?

13 A. Sure. This statement would have been turned over
14 in Jencks'.

15 MR. BAKER: This was turned over and I
16 think Mr. Miller testified about these at the trial.

17 I object to this line of questioning. It
18 is irrelevant.

19 THE COURT: I think it is a fair
20 question, whether it was turned over. He said it
21 was turned over.

22 Q. It was turned over after Mr. Miller testified, as
23 to Jencks'?

24 A. No, before Mr. Miller testified. It was part of
25 Jencks' but it would have been turned over before he

1 actually ever took the stand.

2 Q. It was turned over at the time of trial as
3 Jencks'?

4 A. Exactly. For sure. I don't know if Mr. Alderman
5 didn't mention it before to Mr. Barrett. I don't know
6 about that. I know I turned it over to him.

7 Q. Look at Exhibit Number 72. Exhibit Number 72 is a
8 letter to Mr. Barrett dated July 1, 1987 -- a letter to
9 you from Mr. Barrett dated July 1, 1987?

10 A. Okay.

11 Q. This is a few days before the trial which began on
12 July 6, the jury selection. Do you see the first
13 paragraph?

14 A. Mr. Camp and I?

15 Q. Yes. Mr. Camp and I continue to review the James
16 Lee Jones' matter and it appears is this case is going to
17 go to trial, we may be compelled to offer some proffer as
18 to Mr. Jones' psychiatric status concerning competency at
19 the time of the offense.

20 Paragraph goes on about that.

21 A. Okay.

22 Q. This is notice to you they may rely on a mental
23 state defense, right?

24 A. Well, that is what they intend the letter -- I am
25 sure, yes.

1 Q. But you didn't turn over the transcript of the
2 1972 trial to him in response to that?

3 A. No. I think I already answered that.

4 Q. Didn't the contents of the 1972 transcript take on
5 new meaning for you when you get this letter?

6 A. No.

7 Q. Look at Exhibit 73. What is this?

8 A. State of Tennessee versus James Lee Jones, motion
9 in limine.

10 Q. Filed by whom?

11 A. Signed by myself and Eddie Barnard.

12 Q. Look at the first paragraph. It is hard for me to
13 read the file stamp date. The certificate is not
14 included in this exhibit.

15 It appears to be July, 1987.

16 Do you remember filing this motion?

17 A. No.

18 Q. Look at the end of the first paragraph.

19 First of all, let me ask you this. What
20 is this motion?

21 A. A motion in limine is just what it is.

22 Q. I know. But what is the motion in limine about?

23 A. I haven't read it.

24 Q. There is a motion in limine in which you are
25 asking the court to prohibit Mr. Barrett from mentioning

1 to the jury anything about relying on an insanity or
2 mental condition defense because you hadn't received a
3 motion they were going to rely on an insanity or mental
4 defense?

5 A. Whatever the document says, it says.

6 Q. Look at the sixth line from the bottom of the
7 first paragraph.

8 A. Okay.

9 Q. That sentence says, the attached report clearly
10 shows that the results of the defendant's evaluation --
11 you are referring to the Middle Tennessee Mental Health
12 evaluation?

13 A. I would assume.

14 Q. -- reflect no diagnosis of any mental disease,
15 defect, emotional disturbance or even a personality
16 disorder. See Exhibit A attached.

17 A. Okay.

18 Q. Now, when you gave that notice to Mr. Barrett,
19 this is right before the trial, right? That is when you
20 filed motions in limine, and the file stamp indicates
21 July, '87?

22 A. If it says July -- I can't make out the year. If
23 that is what you say, I will accept it.

24 Q. The trial was July 6th.

25 You're saying you are submitting a copy of

1 a report of an evaluation that shows there is no
2 emotional disturbance, no mental disturbance whatever, is
3 what you're saying there.

4 When you filed this motion and make this
5 affirmation, you have in this trial the transcript from
6 the '72 trial and testimony from Dr. Masri and Dr.
7 Eardley, correct?

8 A. I am sure we had it by then. That is just my best
9 recollection.

10 Q. And the next sentence immediately thereafter says,
11 see Exhibit A, referring to the Middle Tennessee Mental
12 Health report, and further the state's attorneys have
13 interviewed the co-defendant and he has no evidence of
14 the same either.

15 A. I see that.

16 Q. Now, Mr. Jones was sent out to Middle Tennessee
17 Mental Health Institute for a psychological examination,
18 is that correct?

19 A. Yes.

20 Q. And a letter was sent to you from Mr. Southard out
21 there that requested any information you might have to
22 provide them?

23 A. That is their standard practice, yes. They send
24 it to both the defense and the prosecution.

25 Q. And you did provide information, did you not?

1 A. I don't remember. I am sure I would have in a
2 case particularly like this.

3 Q. Let's look at Exhibit Number 34.

4 A. Okay.

5 Q. Can you identify what this is?

6 A. It's a letter dated February 10, 1987, signed by
7 myself to Larry Southard.

8 Q. Forensic services division at the Middle Tennessee
9 Mental Health?

10 A. Yes.

11 Q. Re: James Jones' mental health?

12 A. Yes.

13 Q. Turn over to the second page. Now, a copy of this
14 letter was not sent to defense counsel, was it?

15 A. No.

16 Q. The last paragraph that begins at the bottom of
17 the page says, while at that institution in Petersburg
18 the defendant was indicted in Richmond, Virginia for
19 murder with a weapon at the penitentiary. He was
20 subsequently convicted and sentenced to life imprisonment
21 by the federal court. During those proceedings and
22 according to court records, the defendant through his
23 counsel, moved the court for a competency hearing and
24 psychiatric evaluation as to his sanity.

25 After those examinations were concluded

1 the court ruled that the defendant was competent and
2 court directed the defendant proceed to trial.

3 There appears to be no evidence from the
4 record submitted to us in that proceeding that the
5 defendant relied upon an insanity defense at the
6 trial.

7 A. I see that.

8 Q. That is inconsistent with what is reflected in the
9 record of the 1972 conviction, is it not?

10 Did they not reply upon an insanity
11 defense in the '72 trial?

12 A. I am reading here. Just a minute.

13 Well, let me see. I remember we read
14 today some of the testimony, a portion of the testimony
15 of the Dr. Armon --

16 Q. Masri and Eardley?

17 A. Yes. If the records from the federal courts say
18 he relied upon a defense of insanity, fine. Then this is
19 inconsistent. If it was offered down to manslaughter --
20 sometimes people introduce evidence in a first degree
21 murder case where it doesn't amount to a defense of
22 insanity but designed to negate intent down to a
23 manslaughter.

24 I don't remember, Mr. Redick, if it was a
25 straight up defense of insanity at the federal trial or

1 if it was -- if it wasn't an insanity defense then this
2 is inconsistent with that.

3 Q. And you did not provide to Middle Tennessee Mental
4 Health Institute the transcript of this '72 trial and
5 this testimony of Dr. Masri and Eardley?

6 A. No.

7 Q. And when this case went to trial, Mr. Zimmermann,
8 in your closing argument you argued to the jury that the
9 defendant knew what he was doing, that he enjoyed what he
10 was doing during the course of this killing?

11 A. Which killing?

12 Q. During the course of the killing he was prosecuted
13 for?

14 A. In the state court?

15 Q. Yes.

16 A. Okay.

17 Q. Here in Tennessee?

18 A. I don't remember closing arguments.

19 I didn't know which one you were referring
20 to, the federal murder or --

21 Q. The trial you prosecuted in 1987, and I am
22 referring to page 1675 in the trial transcript, where he
23 knows what he is doing and gets on with it and 1679 where
24 you say, whoever did that, ladies and gentlemen, enjoyed
25 it, had to have. And on page 171 is where you said --

1 General Barnard said, the enjoyment that the person --
2 referred to the enjoyment that the person that did the
3 stabbing had.

4 A. I didn't read it and I don't have it in front of
5 me.

6 If you asked why we said that, Henry
7 Miller testified the stabbing was done in a rhythm type
8 motion, had a rhythm to it. It wasn't a slashing anger
9 or reaction type situation. It was a rhythm type
10 stabbing of both victims. One died and one lived.

11 Q. And at the closing argument in the sentencing
12 stage on page 1981, you argue to the jury, that is
13 because, ladies and gentlemen, you are looking at a
14 depraved man, not someone suffering from severe, extreme
15 emotional disturbance, a deprived man.

16 On page 1982 you argued, you only heard
17 Mr. Barrett tell you one thing, ladies and gentlemen, in
18 his whole trial, he voir dired you on would you believe a
19 psychiatrist or psychiatrist examination or whatever
20 about extreme emotional disturbance or whatever. There
21 is none of that here today.

22 You took the position, did you not, Mr.
23 Zimmermann, concerning this 1972 conviction, this was a
24 drug gang war, right?

25 A. It wasn't a position I took. I based the

1 information I got on about what the circumstances were
2 from an FBI agent who I spoke with who investigated the
3 case. That is the only source of information I had.
4 That and the trial transcript.

5 Q. Right. You had the trial transcript.

6 The trial transcript doesn't say anything
7 about a drug war?

8 A. Well, Mr. Redick, what I got was from the FBI
9 agent.

10 Q. What your testimony is is the FBI agent told you
11 that, is that correct?

12 A. I am telling you this. I spoke to the FBI agent
13 who investigated the case and brought him down to
14 Tennessee for the purpose of being rebuttal testimony to
15 rebut any kind of notion based upon what Mr. James Lee
16 Jones told Detective Garafola that I only killed one
17 person because he tried to have sex with me.

18 We brought the FBI agent down here to
19 rebut that. That is not what he said happened.

20 Q. You can't point to anything in the record in the
21 1972 trial that you had that there was any kind of drug
22 war going on?

23 A. I can't remember what was in the transcript.

24 Q. Do you want to take time to look?

25 A. No, not unless the judge wants me to.

1 Q. Look at Exhibit Number 48. This is a letter to
2 Henry Hudson, the Honorable Henry Hudson from you on the
3 date of April 10, 1987, right?

4 You are requesting --

5 A. A what?

6 Q. A letter to the Honorable Henry Hudson dated April
7 10, 1987 from you in reference to the James Lee Jones'
8 case.

9 You say, I am requesting you authorize
10 former Assistant U.S. David Lowe to disclose the contents
11 of the FBI investigative report regarding the above case
12 where Mr. Jones was prosecuted for murder in the first
13 degree and received a life sentence.

14 You are referring to the 1972 murder
15 conviction, is that correct?

16 A. Yes. You have to get permission from people to
17 get federal employees to talk to you about what they
18 did.

19 Q. Do you see the last sentence in the second full
20 paragraph?

21 A. Last sentence?

22 Q. Second full paragraph?

23 A. Yes.

24 Q. You say, I am also interested in the fact that the
25 previous murder for which the defendant received a life

1 sentence may pattern somewhat the manner in which the
2 present case occurred?

3 A. Right.

4 Q. You are trying to show that this case in 1986 was
5 about a drug war between drug dealers and you wanted
6 the 1972 case to be a drug war between drug dealers,
7 right?

8 A. I was interested whether or not that could be
9 established, yes. What the facts and circumstances of it
10 were.

11 Q. Look at Exhibit Number 49. This is a letter dated
12 April 15, 1987, to you from Mr. David Lowe, correct?

13 A. I am sorry.

14 Q. Exhibit Number 49?

15 A. Okay. I have two 49s. I have got the 49 one that
16 has the letter in it.

17 Q. April 15, 1987?

18 A. Okay.

19 Q. It is to you from David Lowe?

20 A. Okay.

21 Q. David Lowe is a Federal United States Magistrate,
22 correct?

23 A. Yes.

24 Q. He was the United States Attorney in '72 that
25 prosecuted this homicide against James Lee Jones,

1 correct?

2 A. I believe so.

3 Q. And in this letter you say you are sending copies
4 of the transcript filed in that case to him?

5 A. Okay.

6 Q. You are taking this record you had and sending it
7 to him?

8 A. Yes.

9 Q. And you are asking him to get back with you and
10 discuss with you what he recalls about the case.

11 I am sorry. I apologize. There is a
12 letter from him to you and he is sending you copies of
13 the record?

14 A. Yes.

15 Q. I apologize.

16 And he is talking to you about what he
17 recalls about the case and you see beginning in the
18 second paragraph he says, I do not vividly recall the
19 case. Frankly, at one point, I had concluded everybody
20 involved was a homosexual?

21 A. Yes, I see that.

22 Q. Look over on the second page at the beginning of
23 the page. See the paragraph that says the case agent,
24 Lawrence W. Wescott interviewed Jones and obtained the
25 written statement. Jones attempted to make it appear the

1 stabbing was because Stein had been spreading rumors
2 about him.

3 Prison records indicated there was no
4 hostility between the two although there was a report
5 that Jones had been engaged in homosexual activity with
6 an inmate Willie Williams and and inmate whose last last
7 name was Smith.

8 Institutional records indicate that Jones
9 may have been beaten by these two inmates when he refused
10 to return sexual favors.

11 Do you see that?

12 A. Right.

13 Q. Is there anything in this whole letter about a
14 gang drug war?

15 A. I don't know, Mr. Redick.

16 Q. Look at the letter and see if there is anything
17 about a drug war?

18 A. It doesn't mention of drugs specifically in this
19 letter, no.

20 Q. So what happened at the trial was that you brought
21 Agent Delagrange there and told Mr. Barrett that this was
22 about a drug war and Delagrange will back you up?

23 A. You keep saying drug. I don't know that drug was
24 ever -- that is your word. I don't recall saying drug.
25 It may have been drugs.

1 It was a gang situation over who
2 controlled portions of the institution. And that was
3 contrary to the assertion that I only killed a man once
4 because he tried to have sex with me.

5 Whether it was drugs or gangs of violence
6 or gangs of power and control, I don't remember now. I
7 really don't.

8 Whatever it was, Mr. Redick, it was
9 absolutely contrary to the defendant's assertion to
10 Detective Garafola when he was initially charged that I
11 only killed one person in my life and that is because he
12 tried to have sex with me.

13 Q. Do you recall testifying on post conviction in
14 volume 3169 of the transcript as follows?

15 The FBI agent, I asked him about the
16 gangs, and what he relayed to me was that there was a
17 turf war in the prison between the two gangs who would
18 control the drug trade in the prison. Mr. Barrett was
19 present in the courtroom during one of the times when we
20 had a moment to talk?

21 A. I don't remember testifying to that. If that is
22 the information I had, that is the information I had.

23 Q. You don't have it from this record, do you?

24 A. No. I think I said it was from the agent, the FBI
25 agent.

1 Q. You don't have it from the prosecuting attorney
2 that wrote you about the case?

3 A. That's right.

4 Q. But it is something that you recall was told to
5 you?

6 A. Agent Delagrange, we brought him down and
7 interviewed him. He was present in the courtroom and I
8 specifically guided him over the speak to Mr. Barrett.

9 Q. Look at Exhibit Number 34. You have looked at
10 this before and it is the letter that you wrote to Middle
11 Tennessee Mental Health Institute in response to their
12 request for information from you that might be helpful in
13 their evaluation?

14 A. Okay.

15 Q. Look at the third page. Look at the last
16 paragraph that begins -- incomplete paragraph that
17 beginnings at the bottom.

18 A. Okay.

19 Q. This paragraph says, the police theorize that the
20 defendant was relatively new to Nashville and making
21 attempt to become entrenched as a drug dealer in
22 Nashville?

23 Did you have any evidence in your file he
24 was trying to become entrenched as a drug dealer in
25 Nashville?

1 A. I don't remember, Mr. Redick.

2 Q. The victim in this case distributed marijuana from
3 his home but did not distribute cocaine.

4 But you did have information that the
5 victim distributed cocaine, didn't you?

6 A. I don't remember.

7 Q. We will get back to that in a minute.

8 The defendant was wishing to take over his
9 operation and expand to the dealing cocaine.

10 What was the basis for your information
11 that this defendant was trying to deal cocaine?

12 A. I don't remember. I don't know. I haven't looked
13 at my file and I don't know.

14 You have to understand, too, that
15 everything we deal with starts out with the police file.
16 But after that you have discussions with the detective as
17 you ask him to look into things and follow-up and they
18 get back with you.

19 We are having many conversations and
20 meetings with myself and the detectives about the case
21 and trial and facts.

22 So, consequently, from the initial report
23 until the date of trial, there is a lot of information
24 that prosecutors learn that aren't in the initial police
25 reports or in any police report.

1 You are asking them to check into things,
2 what they know and what they hear.

3 Q. Look at the last page of the letter. Look at the
4 seventh line down.

5 Do you see that sentence that begins,
6 further checking?

7 A. Okay.

8 Q. This sentence says, further checking of court
9 records reflect that the defendant was a leader of the
10 prison gang attempting to again control over the victims
11 gang and that the murder was a cold blooded, premeditated
12 murder.

13 What court record is that that you are
14 referring to there?

15 A. I don't recall. Only court record we would have
16 had would be the records that have already been marked as
17 an exhibit and whatever the prosecutor would have told us
18 or the FBI would have told us.

19 Q. Look at the sentence further down in the paragraph
20 that begins, therefore, it appears.

21 This is about seven or eight lines from
22 the bottom of the letter.

23 A. Okay.

24 Q. Therefore, it appears from the evidence that the
25 defendant was the leader in the commission of this crime

1 and it was precipitated as a result of defendant's desire
2 to become a leader in drug activity in Nashville more
3 rapidly than he could have otherwise?

4 A. Okay.

5 Q. Is there anything in your file that indicates he
6 was trying to take over a drug territory?

7 A. In the file? I don't know about the file. I
8 don't remember what is in the file, Mr. Redick, as
9 opposed to what I knew.

10 There is a lot that we know that is not,
11 quote, in the file in the sense of information in a
12 written police report.

13 I think the defendant referred to himself
14 as Scar Face. We received information he was touting
15 himself as another Scar Face, that is reference to a
16 fictional character in a movie starring Al Pachino where
17 a person gets out of the prison with violent record and
18 takes over drug activity.

19 I think Detective Garafola and the
20 defendant's brother had both received information that
21 the defendant had been around town referring to himself
22 as Scar Face.

23 I have only -- in my history only heard
24 two people -- only one person refer to himself as Scar
25 Face. That is the defendant and in one other death

1 penalty case where the defendant watched Scar Face before
2 he committed the murder.

3 Q. The information you had was Devalle Miller and
4 Norma Norman said that at the scene of the crime he
5 referred to himself as Scar Face?

6 A. Yes. Maybe. I didn't recall that right now.
7 What I remember is Detective Garafola telling me that and
8 the police reported where the victims brother, I think,
9 had said the defendant referred to himself around town as
10 Scar Face, put out the word he was Scar Face or something
11 like that.

12 It is such a unique name and description
13 that that is what it connotes, I will take over the drug
14 traffic by force or violence. Because that is what the
15 fictional character in the movie did.

16 Q. Now, are you aware of anything that Mr. Barrett
17 knew about the 1972 conviction other than what you told
18 him?

19 A. No. I don't know what he knew.

20 MR. REDICK: Excuse me just a second, Your
21 Honor.

22 THE COURT: All right.

23 Q. Mr. Zimmermann, turn to Exhibit Number 57.

24 A. All right.

25 Q. This is an interview with George Daniels by

1 General Barnard, correct?

2 A. Yes.

3 Q. And in the third paragraph it describes Big Rob
4 and Mr. Jones renting the Scar Face movie and watching it
5 on TV?

6 A. Okay.

7 Q. But is there anything in there about him being
8 known in the community as Scar Face?

9 A. Is there anything in this memo?

10 Q. Uh-huh.

11 A. Let me look. Not in in memo.

12 Q. You just testified that George Daniels had told
13 somebody --

14 A. The police, I think. Something in a police
15 report. There is a supplement where George told -- I am
16 sure that is why Mr. Barnard asked about it and where
17 Scar Face came from. That is why he put this in here and
18 asked him.

19 Q. You are confident this is in a police report?

20 A. I have seen it. Yes.

21 Q. Look over at the second page of this memo, first
22 paragraph.

23 A. Okay.

24 Q. George Daniels advised he would do a little coke
25 every now and then. He stated he and his brother would

1 sometimes do coke together. He stated that his brother
2 sometimes kept coke at his brother's residence.

3 He also stated that his brother would talk
4 about selling coke every now and then, he does not like
5 to fool with it because there was too much liability
6 involved.

7 Mr. Daniels advised the coke probably sold
8 to several people at the Overnight Company.

9 You had just written a letter to Middle
10 Tennessee Mental Health Institute that he did not sell
11 coke, right?

12 A. Did I say the victim never sold coke?

13 Q. That is what I recall?

14 A. Whatever was in the letter was in the letter.

15 What is the date on this memo?

16 Q. It doesn't have a date?

17 A. Okay.

18 Q. And there was evidence, was there not, that there
19 was cocaine at the crime scene?

20 A. I don't remember. Whatever the records show.

21 Q. Well, you wouldn't dispute the fact that Detective
22 Garafola reported in is the handwritten note there was
23 white powder in the children's room?

24 A. Well, I don't know what white powder is.

25 MR. BAKER: I will let the record reflect

1 there is no evidence of cocaine other than reference to
2 white powder that was never established to be cocaine.

3 Q. There was also evidence --

4 THE COURT: Go ahead. That is sustained.

5 Q. There is also evidence that a hypo syringe cap was
6 taken from Ms. Norman's possession?

7 A. Whatever you say the record says, I will accept.
8 I don't have a recollection of it.

9 Q. When this case was tried, what information did you
10 have about the Southeastern Gospel Ministry?

11 A. You asked me that a lot at the deposition. Today
12 I don't remember.

13 But I have looked at some of the memos
14 that you have shown me during the deposition. This
15 morning when I was looking through one of the exhibits, I
16 noticed in one of the memos where Neal McAlpin -- and I
17 remember this -- I remember Mr. McAlpin coming to me
18 shortly after he undertook representation and talking
19 about something about a Sam Blackstock and that there was
20 a group of people that his client was a part of, some
21 religious group.

22 I think we were trying to pursue it only
23 from Mr. McAlpin's assertion that there was a third
24 person present during the murder, which contradicted what
25 Norma Norman said.

1 I basically invited him, any information
2 you have about who this Sam Blackstock is, let us know.

3 We checked and found out there was no
4 person by the name of Sam Blackstock. No one ever heard
5 of anybody that went by that nickname or street name,
6 according to Detective Garafola.

7 Q. You knew Allen Boyd was connected with the
8 Southeastern Gospel Ministry?

9 A. We heard the name, yes. It was reported to us by
10 Mr. McAlpin or Barrett.

11 Q. Or Mr. Miller?

12 A. Yes.

13 Q. He gave the information about the Southeastern
14 Gospel?

15 A. He comes in the picture way late. But I am
16 talking about when Mr. McAlpin was in the case before we
17 had Mr. Miller in custody.

18 Q. You included Mr. Allen Boyd's name as a potential
19 witness on the indictment, did you not?

20 A. I didn't. Cheryl Blackburn prepared the
21 indictment. She was handling the case for the office
22 at the time of the indictment. She prepared the
23 indictment.

24 I think I pointed that out to you. I even
25 showed her handwriting, handwritten form to have the

1 indictment typed from. She put that on there.

2 Q. She was an assistant in the office at that time?

3 A. Yes. She is a criminal court judge now.

4 Q. Parol officer Lewis Trammel told you about
5 Southeastern Gospel Ministry, too?

6 A. Could have. I don't remember.

7 Q. Look at Exhibit 15. This is a letter from you to
8 Mr. Lewis Trammel dated September 23, 1986.

9 A. Okay.

10 THE COURT: Did you say 50 or 15?

11 MR. REDICK: 15.

12 Q. The letter is dated September 23, 1986, to Mr.
13 Lewis Trammel. It is three pages long from John
14 Zimmermann.

15 A. Okay.

16 Q. And the second full sentence at the beginning of
17 the letter says, you advised me that defendant stated
18 prior to February 18, 1986, that he, Devalle Miller and
19 Sam Blackstock had established new church known as the
20 Southeastern Church of the Gospel of Ministry and that
21 the church's mains objection was to rid the community of
22 prostitution and drugs?

23 A. I see that.

24 Q. This is information given by Lewis Trammel?

25 A. Yes. I think we first learned about Mr. Lewis

1 Trammel -- when the defendant was arrested I think
2 Detective Mack Elroy and Garafola basically said that
3 federal people, he kind of swooped down in a hurry. He
4 was under a federal protection plan or something and
5 there was a lot of interest from federal people.

6 And so there was some contact from the
7 federal people with him about all that.

8 Q. Lewis Trammel, the parole officer, went and
9 interviewed him?

10 A. According to the letter, yes.

11 Q. Mr. Trammel informed you what he learned in the
12 interview?

13 A. Yes, he did.

14 Q. The next sentence in the letter says, you further
15 advised me that the defendant informed you that the
16 victims in the present murder case are part of their
17 first vigilante mission.

18 A. Okay.

19 Q. Here you are being told it is not a drug war, you
20 are being told they are trying to rid drug dealers from
21 the community. They are not trying to take over drug
22 dealers.

23 A. That is what the defendant told --

24 Q. I understand.

25 A. Right. The defendant's version to his probation

1 officer.

2 Q. I understand that.

3 A. They lied to them before.

4 Q. We haven't seen any other version other than your
5 word?

6 A. Well --

7 MR. BAKER: The version of Sam Blackstock?
8 If that is it, I move to strike that.

9 THE COURT: It is unduly argumentative.
10 Go to the next question.

11 Q. All right.

12 A. When the defendant calls himself Scar Face during
13 the murder, I think that is contrary to a mission to rid
14 the city of drugs. You don't refer to yourself as Scar
15 Face when you are trying to do good deeds.

16 Q. Look at Exhibit 51, Mr. Zimmermann.

17 A. Okay.

18 Q. We have looked at this before. The first page of
19 Exhibit 51, your file cover that contains Miller's
20 confession as you call it?

21 A. Okay.

22 Q. Do you see there in handwriting on the file,
23 William A Boyd, 738 Ringgold Avenue, 876-4860?

24 Where did you get that from?

25 A. I don't remember.

1 Q. Did you talk to Mr. Boyd on the telephone?

2 A. I could have. I don't know.

3 Q. Is that your handwriting?

4 A. Yes, it is.

5 Q. Look at Exhibit Number 94. Tell us what this is.

6 This is not a letter to you. This is a letter to

7 attorney Ross Alderman from Karen Miller.

8 Have you ever seen this letter?

9 A. I don't recall it.

10 Q. Do you recall it being introduced at Devalle

11 Miller's sentencing hearing?

12 A. It could have been. I don't recall.

13 Q. Look at the second page there. This second full

14 sentence or sentence on the third line that begins the

15 people in the Southeastern Gospel Ministry knew that

16 Devalle had a kind heart. Especially James Jones.

17 They also knew that Devalle was easily

18 influenced. They became his friend by taking him

19 jogging, bike riding and teaching him karate. They

20 influenced him with their religious beliefs and made him

21 believe that he was doing the right thing for himself and

22 his fellow man.

23 It is truly my belief that Devalle was

24 brain washed by the Southeastern Gospel Ministry and its

25 followers. In all they took advantage of his kind and

1 giving heart.

2 Q. This was Devalle Miller's position at the
3 sentencing hearing?

4 A. Yes, which was after.

5 Q. After the trial?

6 A. That is what I am saying. They were saying that
7 Devalle had a kind heart and was taken advantage of by
8 James Jones and other members of the Southeastern Gospel
9 Ministry.

10 Q. You recall that Devalle Miller testified at post
11 trial that Mr. Boyd gave him a gun?

12 A. I don't recall that.

13 Q. And Mr. Boyd gave him the gun and he carried it
14 into the apartment?

15 A. I don't recall what it was.

16 Q. You were aware from another source other than
17 Jones or perhaps from Miller that William Boyd had given
18 a gun to Jones, were you not?

19 A. I don't know. You can refresh my memory.

20 Q. Do you recall during the sentencing stage of the
21 trial when you asked Jones if that gun that he referred
22 to in his testimony had not been provided to him by
23 William Boyd because he was a bodyguard for William
24 Boyd?

25 A. Well, if I asked that question I had someone tell

1 me that is what happened.

2 Q. I am referring to 1903 and 1904 in the transcript.

3 Do you recall who told you that?

4 A. No. It could have been Allen Boyd, could have
5 been Henry Miller. I don't know.

6 Q. It could have been Allen Boyd. Do you recall
7 talking to Allen Boyd?

8 A. No, I don't recall talking to him. I don't recall
9 Mr. Miller saying that. He could have.

10 Q. But you wouldn't have asked that question --

11 THE COURT: Mr. Baker.

12 MR. BAKER: He said Henry Miller. I
13 believe he meant Harold Devalle Miller.

14 THE COURT: I think that is clear from the
15 context.

16 Q. You wouldn't have asked that question unless you
17 had some basis for it, would you?

18 A. No.

19 Q. Mr. Zimmermann, you have been cited, have you not,
20 in two disciplinary actions?

21 MR. BAKER: I object, unless they can lay
22 a foundation.

23 A. I don't mind answering that. Since he brought it
24 up, I will tell you exactly what those were about.

25 THE COURT: The witness says he doesn't

1 mind answering the question.

2 MR. BAKER: I will withdraw the
3 objection.

4 A. One of those dealt with a case that is reported in
5 Southwest 2d styled Zimmermann versus Board of
6 Professional Responsibility.

7 There was a murder case where quadriplegic
8 had been murdered and his body deposited on the way to
9 Memphis. The defendant was arrested in Memphis.

10 On the way back from Memphis the defendant
11 made or gave an oral confession to the detectives
12 transporting him. At the conclusion of the preliminary
13 hearing at the jail docket I made certain statements to
14 the press which were described in the reported decision
15 of Southwest 2d. I don't have the citation on that.

16 MR. REDICK: 746 Southwest 2nd 757,
17 Tennessee Supreme Court, 1989.

18 A. The public defender filed a disciplinary complaint
19 against me for those statements I made to the press,
20 which are described in the opinion.

21 Nothing happened about the complaint for
22 about nine months. It just -- after I responded to it
23 nothing happened to it. Then a second complaint was
24 filed by the public defender for comments made at the
25 conclusion of a trial of a jointly -- separately tried

1 co-defendant. Two trials where essentially a lady was
2 brutally raped and kidnapped and basically left a
3 vegetable.

4 After that trial and before sentencing, I
5 made comments to the press that we were going to be
6 seeking the maximum punishment. They filed a complaint
7 against me for those. Those comments were made seven
8 months prior to the complaint.

9 I responded to that. After that a formal
10 petition for discipline was filed against me by the
11 disciplinary board. I admitted making the statements but
12 felt they were not in violation of the rules.

13 The three lawyer hearing panel recommended
14 a private reprimand. The Disciplinary Board appealed.

15 The trial judge recommended a private
16 reprimand and the Disciplinary Board appealed, and the
17 Tennessee Supreme Court imposed a private reprimand.

18 It was a four to one decision, Justice
19 Drowata dissented, bless his heart.

20 Q. Before you get past that, there was actually two
21 complaints, wasn't it? A complaint by attorney Pat
22 McNalley and attorney Sumter Camp?

23 A. No. Actually by Jim Weatherly. Both of them
24 signed it, or Jim signed it. They worked for Jim
25 Weatherly.

1 Q. These were two different complaints, were they
2 not?

3 A. Yes. See what happened, the first one was filed
4 and nothing happened to it. The Disciplinary Board
5 counsel told the public defender we are not going to move
6 on it unless we get a second complaint. Hence the second
7 complaint came in for something I said seven months
8 before the complaint. That is what triggered the formal
9 decision for discipline. They had two complaints by the
10 same office.

11 That is a matter of now public record.

12 The second action, judge, was statements I
13 made to the TV, comments I made on television at the
14 conclusion of a rather publicly -- vehicular homicide.
15 Three victims were killed by a defendant that had prior
16 DUIs.

17 There was an issue at the trial as to
18 whether or not this constituted murder, vehicular
19 homicide. At the time the punishment was much lesser for
20 vehicular homicide. The jury obviously compromised and
21 found him guilty of vehicular homicide under the belief
22 he would serve the sentence that the judge instructed
23 him.

24 At that time under Tennessee law the judge
25 was required to tell the jury what range of punishment

1 the defendant would be eligible for should the jury find
2 him guilty, and even though the jury didn't do the
3 sentencing.

4 It was reported in the press, both print
5 media and television media, from members of the jury they
6 were kind of stunned when they found out how fast he can
7 get out on parol; they only compromised on a vehicle
8 homicide because they thought he would serve 18 years in
9 prison.

10 When the jury found out he was immediately
11 eligible for parol -- because he had spent about a year
12 locked up -- there was kind of a huge cry about that.

13 I was interviewed about that and basically
14 very poor choice of words on on my part. The reporter
15 asked me, in other words the judge, when he tells the
16 jury the punishment, he is not telling them the truth? I
17 said, no, that is right, the law forces the judge to lie
18 to the jury. Very poor choice of words on my part.

19 Judge Everatt filed a disciplinary
20 complaint. I responded to that and a public censure was
21 imposed as a result of that.

22 Q. There was another incident, was there not, in
23 which you were cited for contempt for failing to comply
24 with criminal discovery rules?

25 A. No, I was never cited for contempt. What are you

1 looking at?

2 Q. State of Tennessee versus John Zimmermann slip
3 opinion of August 27th, '85, appeal from summary
4 judgment. Finding of contempt of court and a fine of
5 \$25.

6 The alleged contempt is for what was
7 perceived by the court to be a partial noncompliance of
8 Rule 16, discovery rules of the Tennessee Rules of
9 Criminal Procedures. The question surfaced during the
10 pressures of a jury trial of multiple defendants being
11 tried on drug charges. Certain tangible evidence was not
12 specifically listed by General Zimmermann in a request
13 for discovery.

14 According to this one page slip opinion,
15 the court ruled that they did not judge whether or not
16 there was a violation of Rule 16 and sufficient evidence
17 to support a conviction of the contempt of courts. What
18 we do hold, there was no contempt in the presence of the
19 court.

20 Do you recall that?

21 A. Yes. This was a case in front of Judge Kurtz
22 where Judge Kurtz had in several other unrelated cases
23 imposed fines on defense lawyers, believed he had the
24 powers of federal judges to impose fines on people.

25 In this case there was a discovery issue

1 about some evidence that had been put into the police
2 department evidence room by a patrol officer other than
3 the detective, evidence we were not aware of.

4 When that evidence became known to us
5 during the middle of the trial, Judge Kurtz became upset
6 saying we didn't use due diligence by discovering
7 everything. He imposed a \$25 fine on me without a
8 finding of contempt.

9 I appealed that because I didn't believe
10 under state law you had power to impose fines on lawyers
11 without a finding of contempt. That is what the appeal
12 was about.

13 That is what the court said, that without
14 a finding of contempt you don't have the jurisdiction to
15 impose a fine. Sumter Camp --

16 Q. That isn't what this opinion says?

17 A. I am telling you what happened, Mr. Redick. I am
18 telling you the fine was reversed because there was no
19 finding of contempt.

20 I was not in contempt of anybody, Mr.
21 Redick.

22 Q. The first line of this opinion -- I will make it
23 an exhibit to your testimony -- says this is an appeal
24 from summary finding of contempt and the result of the
25 case was that they found -- they did not judge whether

1 there was a violation of Rule 16, which was the contempt
2 citation.

3 They found that there was no contempt in
4 the presence of the court and remanded the case to the
5 trial court where the trial court has the option of
6 giving notice of conducting a due process hearing or
7 dismissing the charge sua sponte?

8 A. That was their terminology. That is how they
9 characterized it. I saw the order from Judge Kurtz.
10 He just imposed the \$25 fine.

11 I know you looked at it because you
12 uncovered everything in the case.

13 THE COURT: Let's mark it as an exhibit.
14 What number is that, please?

15 THE CLERK: 147.

16 Q. Mr. Zimmermann, you made the decision in this case
17 to seek death and the jury returned a verdict of death,
18 and we are all aware of that. That is why we are here
19 today.

20 A. I didn't make the decision. It was a call made by
21 General Shriver.

22 Q. It was your recommendation?

23 A. Absolutely.

24 Q. You are satisfied with the juries' decision in
25 this case?

1 A. Is that a question?

2 Q. That is a question.

3 A. Yes, I am satisfied.

4 Q. And you want the sentence of death to be carried
5 out and imposed against Mr. Jones?

6 A. Well, my duty was to prosecute the case. My duty
7 of the case is concluded, unless the case is returned for
8 further proceedings.

9 MR. REDICK: I have no further questions,
10 Your Honor.

11 THE COURT: Mr. Baker.

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EXAMINATION OF JOHN ZIMMERMANN

BY MR. BAKER:

Q. Mr. Zimmermann, if I can refer you to petitioner's Exhibit 42. If you have it in front of you, turn to the page that is date stamped 679.

A. Okay.

Q. At the bottom of that halfway down there is a statement, there is no concern about Miller's mental condition.

Is that supposed to be Jones' mental condition?

A. I am sorry. Can you tell me again?

I see. There is no concern. Yes.

Q. This is in the section entitled the defendant Jones' mental condition?

A. Right.

Q. Was that your conclusion, that in your opinion that there was no concern about his mental condition with regard to this case?

A. Yes.

Q. If you look a little further down on the same page there is the section referring to the parol officer, Mr. Trammel?

A. Let me see. I see now, Lew Trammel, the defendant's federal parol officer.

1 Q. You set forth basically what he told you?

2 A. Yes.

3 Q. And Mr. Trammel's source of information was Mr.
4 Jones, correct?

5 A. That is what I understood.

6 Q. If you will pull out the '72 transcript,
7 petitioner's Exhibit 131.

8 A. Do you want me to go to Exhibit 131?

9 Q. Yes. It is separate.

10 A. There one here?

11 Q. Right. Turn to page 66.

12 A. Of the transcript?

13 Q. Which is a portion of the testimony of Dr.
14 Eardley.

15 A. What is the date stamp?

16 Q. Upper right-hand corner, page 66.

17 A. Okay. That is date stamp 786.

18 Q. The question starts on the prior page. It says,
19 doctor, you were asked before whether when somebody loses
20 their temper and results in some sort of violent act, may
21 not know what they are were doing, whether they were
22 temporarily insane. Would you tell the jury why you
23 answered the question the way you did?

24 Well, you know, when you have fits of
25 moments -- and I think everyone in here does, we all

1 get angry sometimes, like somebody getting mad throwing
2 a coffee cup or throwing a saucer at someone. And I
3 think Jones at this particular time was pretty angry and
4 upset.

5 But in terms of legal insanity, I think
6 that is what we are talking about, I don't think that is
7 my decision to decide a legal term.

8 So that is why I you hedged on whether or
9 not there was temporary insanity?

10 Yes.

11 All right. Now, let's go back to Jones
12 himself. You are maintaining he doesn't have a disease
13 or defective mind. What does he have?

14 I think in my definition and even what has
15 been brought out, he has a personality problem.

16 Question. But that is not a product of a
17 mental disease or deficiency?

18 That's correct.

19 Now, are those statements likely to be
20 statements that you relied upon when you wrote this memo
21 that is Exhibit 42?

22 A. Yes.

23 THE COURT: I am confused. This is dated
24 March 24th. It appears from 49, if I recall correctly,
25 the transcript was provided -- looks like in April.

1 Am I missing something?

2 MR. BAKER: Let me clarify that.

3 THE COURT: I may be wrong about the
4 chronology.

5 Q. Do you recall precisely when you received the 1972
6 transcript?

7 A. No.

8 Q. So, at this time it would be, I guess,
9 speculative to state what exactly the resources that
10 you used to form your opinion were based upon.

11 Is it -- basically, can you tell us that
12 today?

13 A. No. Not with any absolute certainty, no.

14 Q. You talked about Sam Blackstock, and that issue,
15 who was mentioned by Mr. Jones?

16 A. What was the Exhibit Number of the memo that we
17 were referring to earlier? What was that Exhibit
18 Number?

19 THE COURT: 42.

20 Q. 42 was the exhibit regarding your memo to Mr.
21 Barnard.

22 A. Okay.

23 A. Was the question whether or not I relied upon
24 those statements?

25 Q. From the transcript?

1 A. To prepare the preliminary dated March?

2 Q. Right.

3 A. I think I refer to on date stamp 679, I received a
4 copy of the transcript. So, yes, I would have.

5 I don't believe we would have gone to
6 General Shriver with this without trying to uncover
7 everything we possibly could have. This transcript would
8 be one thing we looked at.

9 I say I received a copy of the transcript
10 of the first trial. So, we did.

11 THE COURT: Okay. I am just confused by
12 the reported --

13 A. I was to, judge.

14 THE COURT: It could have been more than
15 one source for the transcript. I am with you. That
16 helps clarify.

17 Q. Thank you, Mr. Zimmermann.

18 You mentioned earlier you have had
19 practice before Judge Kurtz before and after this case, I
20 believe?

21 A. Yes.

22 Q. And have spent considerable time in his court?

23 A. Yes, I have.

24 Q. Do you have an opinion regarding his reputation
25 for impartiality and integrity as a judge?

1 A. Highly regarded. Judge Kurtz was the Metro Public
2 Defender in Nashville. I think he served two terms, two
3 four year terms. And prior to that, judge, he worked
4 with the Middle Tennessee Legal Services organization
5 which is kind of like a non-profit organization that
6 provides legal services to the poor.

7 He was basically kind of out of that group
8 of people who handled that kind of work.

9 Judge Kurtz didn't run for criminal court
10 judge but ran for circuit court judge and was elected in
11 his first attempt. There was a vacant seat Judge North
12 held that and resigned that seat.

13 Judge Kurtz was highly regarded by the
14 defense bar, which is the reason why they urged him to
15 take on the duties as a so-called fourth criminal court
16 judge because of the tremendous backlog in cases we had
17 with just three criminal court divisions.

18 He agreed to do that and the other judges
19 agreed to take over his civil caseload. He basically
20 acted as a fourth criminal court judge.

21 Judge Kurtz was highly regarded in his
22 fairness, particularly to the defendants.

23 Q. In this case with regard to both the trial and
24 post conviction proceeding, did you observe anything
25 regarding Judge Kurtz that would in your mind call in to

1 question his integrity or impartiality regarding Mr.
2 Jones?

3 A. Absolutely not.

4 Q. If I can refer you to Exhibit 49. This is the
5 letter from Mr. Lowe to you.

6 A. Okay.

7 Q. On the second page of that letter it says the case
8 agent Lawrence W. Wescott interviewed Jones and obtained
9 the written statement. Jones attempted to make it appear
10 the stabbing was because Stein had been spreading rumors
11 about him. Prison records indicate that there was no
12 hostility between the two although there was a report
13 that Jones had been engaged in homosexual activity with
14 an inmate Willie Williams and an inmate whose last name
15 was Smith.

16 Institutional records indicate that Jones
17 may have been beaten by these two inmates when he refused
18 to return sexual favors. The report continued that Jones
19 gathered up his group and they began to walk the compound
20 looking for Willie Williams.

21 It was this report that convinced me that
22 Jones probably was a violent troublemaker. I was also of
23 the opinion that Jones entered the cell with the specific
24 purpose of killing Stein because he had his friends with
25 him and because he stabbed Stein not only once, but then

1 again a second time when Stein was already down on the
2 bed.

3 Now, do you recall anything that Mr. Lowe
4 or anyone else told you that indicated Stein was trying
5 to rape Mr. Jones when this attack occurred?

6 A. No. The homosexual activity was consensual and
7 never any indication of any rape, sexual assault.

8 Q. If you will go back to the transcript again,
9 Exhibit 131. I believe Agent Wescott's testimony, page
10 30. It is a brief excerpt.

11 Are you there?

12 A. Yes.

13 Q. Agent Wescott testified Mr. Jones said up to and
14 prior to this time he had been associated with a certain
15 group of inmates in a reformatory known as the North
16 Carolina group.

17 Michael Stein on the other hand was
18 associated with another group known as the D.C. group.

19 Now, with reference to these groups, do
20 you know whether or not those were the groups that Agent
21 Delagrangé was referring to when you had conversations
22 with him?

23 A. Yes.

24 Q. That is your memory?

25 A. Yes. They were competing, rival gangs. I don't

1 remember if he used the term North Carolina or D.C.. He
2 may have. I don't have a memory of exactly what he told
3 us.

4 Q. I will have marked Defendant's Exhibit 14, I
5 believe, is that correct?

6 THE COURT: Okay.

7 Q. Mr. Zimmermann, will you please read through that
8 report briefly.

9 A. Okay.

10 Q. You testified earlier on direct examination you
11 believed there had been some information from the victims
12 brother that Jones had been known in the neighborhood as
13 Scar Face.

14 The reporting officer on this report is
15 Detective Tim Allen. Do you know whether or not -- do
16 you recall now whether or not this may have been the
17 source where the information you testified to on direct
18 examination came from?

19 A. I can't be absolutely certain this was the
20 report. But there was something in a police report and
21 George Daniels was actively cooperating with the police
22 trying to get their case solved and people responsible
23 for his brother's death brought to trial.

24 I am sure this is why Eddie Barnard asked
25 him specifically about what he knew about the Scar Face

1 situation.

2 MR. BAKER: We move for admission.

3 THE COURT: That will be admitted.

4 Q. Mr. Zimmermann, I am going --

5 MR. REDICK: What Exhibit Number is
6 that?

7 THE COURT: Defendant's 14.

8 Q. Mr. Zimmermann, I will draw your attention to your
9 testimony at the post conviction proceeding. Excuse me,
10 at the trial. On page 1799 there was -- this wasn't your
11 testimony, it was just the proceedings in court. It is
12 in between the guilt and sentencing phase.

13 You start, Mr. Zimmermann. Your Honor,
14 first of all, I want to take up the math matter Mr.
15 Barrett addresses as to whether or not he can call
16 himself as a witness in the case to testify that the
17 defendant was a member of a religious organization that
18 apparently involved certain other members.

19 As the court will recall, we had an
20 in-chambers conference after the jury was selected but
21 before they were sequestered. We asked for that
22 conference out of concern for the integrity and security
23 of the jury over the weekend concerning possible jury
24 tampering might occur.

25 We advised the court that we had reason to

1 believe based upon our investigation that the defendant
2 was a member of a group organization, very tightly knit,
3 that contained at least two of those people.

4 You go on a little further. As I told the
5 Court, that information was not based on any direct
6 knowledge. That information was based on -- not any
7 information received from the police report but
8 information received from defense counsel and also
9 information that we received from Mr. Harold Devalle
10 Miller.

11 I have no direct knowledge and neither
12 does the police department have any direct knowledge of
13 any such organization.

14 Do you recall that happening at the
15 trial?

16 A. I have got a faint memory of Mr. Barrett
17 indicating he may call -- he may attempt to put me on the
18 witness stand to testify about whatever I knew about this
19 organization.

20 I wanted the judge -- one of the issues
21 I wanted to address with the judge is whether or not
22 this would happen. I didn't want something to pop out
23 in front of a jury. Let's handle it in a
24 jury-out-hearing.

25 I was concerned and wanted the judge to be

1 aware and I alerted him to the possibility.

2 When we selected the jury to try the case,
3 in Nashville we pick jurors based on a death penalty
4 case, it usually takes five days to death qualify a jury.
5 To keep them from being locked up over the weekend the
6 judge won't swear the jury. He will send them home and
7 bring them back on Monday and start the jury, swear the
8 jury and sequester them and go from there. It gives them
9 one more weekend at home.

10 That is what I wanted to address. By
11 Friday you have the jury picked. Everybody knows who is
12 going to be on the jury. Their names, addresses and
13 telephone numbers are a matter of public record.

14 I was just trying the two alert the judge
15 we were concerned about it for over the weekend.

16 Q. Do you recall the specific concern in regard to
17 this group that the defendant had been a member of?

18 A. Yes. That they would try to improperly contact
19 one or more of the jurors.

20 Whenever you have people dedicated for a
21 cause, family ties or some other cause, there is that
22 possibility, concern.

23 So, I just wanted the judge to know that
24 even though there may not be family members we are
25 concerned about, we had been told this information and

1 told the source of the information and brought it to his
2 attention so he could take whatever steps.

3 The judge is the one that controls the
4 jury and he is responsible for the jury. That is why I
5 made him aware of whatever we knew.

6 Q. Was this a concern based upon some specific
7 information that there may be jury tampering occurring or
8 is this out of a precautionary measure?

9 A. If I didn't mention anything more specific than
10 what I did. My best guess today it was just a
11 precautionary measure.

12 It is still our duty to alert the judge
13 whenever we have concern. The last thing I would like
14 for the judge is to come in Monday morning and say why
15 didn't you make me aware of this. That is what we were
16 doing.

17 Q. Now, you said you received some information from
18 Harold Miller and defense counsel.

19 Do you recall precisely what that
20 information was?

21 A. No, I do not.

22 Q. General Zimmermann, is it a normal occurrence for
23 prosecution attorneys and detectives to develop theories
24 about cases?

25 A. Yes.

1 Q. Are those theories always remain the same or
2 do they sometimes change or progress as the case
3 develops?

4 A. They change. The more experience I have gotten
5 the less stock I try to establish a theory.

6 Q. Of course there has been some reference here to
7 theories that you or the detectives may have had about
8 the case at various times.

9 Were those based upon your best review of
10 the evidence at those times?

11 A. At the time they would have been, yes. Theories
12 are designed when you are trying to get a case ready for
13 trial with detectives, you are trying to point out to
14 them you want them to tell you, okay, so what are we
15 going to argue to the jury of how this crime happened and
16 what did happen.

17 Then you start playing devils advocate
18 about where the holes are and you find out where this is
19 and what this is. Sometimes theories change.

20 Hopefully a good, honest prosecutor will
21 keep himself open to any possibility even including that
22 the defendant is innocent.

23 You always are looking at the evidence and
24 trying to in an objective way.

25 Q. Do you believe you are a good, honest prosecutor?

1 A. Yes. I know I am.

2 Q. Do you believe in this case that you adhered to
3 those ideals and goals as a prosecutor?

4 A. I believe in that strongly, and I try to.

5 MR. BAKER: That is all, Your Honor.

6 THE COURT: I have a couple questions.

7 A. Yes, sir.

8 THE COURT: Have you been approached by or
9 otherwise talked to either Allen Boyd or William Beard
10 any time in the last several weeks?

11 A. No, Your Honor.

12 THE COURT: All right. On another
13 question, there has been some discussion of the 1972
14 transcript that you had at some point, exact point is at
15 least at the moment unclear to me. Certainly if not
16 directly by inference there is a suggestion from
17 petitioner's counsel that that would have been Brady
18 material or Jencks' material or otherwise should have
19 been disclosed.

20 If I understand your testimony correctly,
21 it was not provided to either Mr. McAlpin or Mr. Barrett,
22 and I am not sure I fully understand what your view is
23 on whether it should have been provided. If so, why it
24 was not provided.

25 Let me set it up in a real direct way and

1 get some direct answers to those questions.

2 A. When I got the transcript, I reviewed it, and sat
3 down with Eddie Barnard and reviewed the transcript with
4 him as far as what was in there.

5 It was my interpretation, right or
6 wrong, my interpretation that the transcript showed an
7 opinion by a psychiatrist or psychologist at the time of
8 the crime that the defendant had some irresistible
9 impulse, got angry and exploded.

10 There wasn't any definable mental illness
11 such as paranoid schizophrenia, bi-polar disorder that is
12 here today and gone tomorrow. I interpreted the
13 testimony as being that type of personality disorder. He
14 got angry and he snapped that one time.

15 Based on all the testimony, I concluded
16 for two reasons, one the lapse of time or I guess you
17 might say the distance in time between the two events and
18 what I call very weak testimony from the defense
19 psychiatrist at the trial, that it was not exculpatory,
20 would have no bearing on explaining whether at the time
21 of this crime he had a mental illness or suffered from
22 any kind of emotional snapping, because the situation in
23 the federal prison was one where even taken in light most
24 favorable to the defendant was triggered as a result of a
25 sexual assault on him.

1 That wasn't the case here where the
2 defendant sought out the victim and went to the victim
3 and pursued the victim. That was my thinking, judge.

4 THE COURT: Of course, that relates
5 directly to the guilt or innocence phase of the trial.

6 I believe you indicated Brady material was
7 anything that mitigated regarding punishment or -- what
8 is your view whether that was Brady material regarding
9 the sentencing phase to the trial?

10 A. I think my position was, my interpretation of the
11 document was the same. It seemed like the psychiatrist,
12 all kinds of -- qualified it based on external
13 circumstances that were happening with the defendant at
14 the time of the killing in prison, in the federal prison,
15 in his explanation that the defendant just got angry and
16 snapped.

17 There wasn't any indication that there
18 were any external circumstances here on the defendant,
19 and under the mitigating factors it talks about the
20 defendant at the time he acted while acting under extreme
21 emotional distress, something to that effect, at the time
22 of the killing.

23 I didn't see the two as proving -- as what
24 happened in '72 as proving what happened in '86. That
25 was just my interpretation.

1 THE COURT: Thank you. I understand your
2 answer.

3 Anything else anybody wants to follow-up
4 on?

5 MR. BAKER: No, Your Honor.

6 MR. REDICK: I have just a couple
7 questions.

8 THE COURT: All right.

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EXAMINATION OF JOHN ZIMMERMANN

BY MR. REDICK:

Q. Mr. Zimmermann, that '72 conviction that the judge referred to was used by the prosecution as aggravating circumstances in this case?

A. Yes, it was. The defendant was free to testify about it, too. Because he did testify.

Q. Now, Mr. Zimmermann, this word gang that you referred to and Mr. Baker resurrected again about the '72 conviction, that is your word, is it not?

The testimony in the '72 trial was talking about a group of people from D.C., a group of people from North Carolina.

Gang is your word?

A. I don't know if Mr. Delagrang used it or not. I don't recall. But I will accept that. I don't think they were clubs.

Q. Well, this court has testimony from Special Agent Delagrang and Elmer Bishop who is a custodial --

A. I haven't been aware of other testimony. I don't know what they said.

Q. Would you be surprised if they didn't refer to gangs?

A. I wouldn't be surprised whether they did or didn't. I wouldn't have an opinion about it.

1 I haven't been told about anybody else's
2 testimony.

3 Q. Are you aware of any one other than yourself that
4 refers to these gangs?

5 A. Eddie Barnard did.

6 Q. You and Eddie Barnard?

7 A. Yes.

8 MR. REDICK: Your Honor, if I could refer
9 once again to Defendant's Exhibit 14.

10 First of all, Your Honor, I assume that
11 this is being submitted as an exhibit containing
12 information upon which Mr. Zimmermann relied but not
13 substantive evidence, because it is obviously hearsay.

14 I would object to it as substantive
15 evidence.

16 THE COURT: Haven't the parties stipulated
17 that the police department records are to be admitted?
18 Isn't that my memory?

19 MR. REDICK: I was under the impression --

20 MR. BAKER: That is my understanding.

21 MR. REDICK: -- authenticity was being
22 admitted.

23 MR. BAKER: Your Honor, I am not really
24 offering it for the authenticity. I am offering it for
25 the reports they had and what the prosecution relied

1 upon.

2 MR. REDICK: It is not a major point. I
3 will withdraw my objection.

4 THE COURT: Okay. I think this is all
5 right.

6 Q. In any event, this is a report from Detective Tim
7 Allen. What the report says is that he referred to Jones
8 as Scar Face, not that anybody else did, correct?

9 A. That detective Allen called him Scar Face?

10 Q. Right.

11 A. No, I don't think he called him that. He
12 said --

13 Q. The reporting officer talked with the victim's
14 brother, George Daniels. He stated he had been talking
15 with some people in the neighborhood and that Scar Face
16 was supposed to be hanging out at Bill's Drive-in. He
17 also was traveling in a blue Olds 98 with out of state
18 tags?

19 A. You are asking how I interpret that?

20 Q. Yes.

21 A. I don't understand what the question is. You just
22 read the document.

23 Q. Right.

24 THE COURT: I don't think it is necessary
25 to get into this. Mr. Zimmermann testified it was his

1 memory he heard from Mr. Daniels or somewhere in the
2 police files that Mr. Jones had referred to himself as
3 Scar Face. Mr. Baker offered that as one possible
4 source.

5 If I recall Mr. Zimmermann's testimony, it
6 was that he didn't specifically recall that document but
7 that may have been where he got the information. It may
8 have come from somewhere else.

9 We are sort of in this stage where he
10 can't say for sure whether he even saw it.

11 I think you are getting far afield. I got
12 the point you are both trying to make.

13 MR. REDICK: That is fine, Your Honor.

14 Q. Now, referring now to the business about asking
15 for the jury list from defense counsel in this trial.

16 A. Asking for the jury list?

17 Q. Yes, requesting that the jury list for defense
18 counsel be turned over to the state or court?

19 A. I don't know what you are talking about.

20 Q. Mr. Baker asked in testimony that you were
21 concerned whether or not there may be some risk to the
22 jury from the Southeastern Gospel Ministry?

23 A. Yes.

24 Q. I believe you described that as a precautionary
25 measure.

1 Is that correct?

2 A. That is what I said.

3 Q. But this was an extremely rare request, was it
4 not?

5 A. I don't think -- I think probably less than half a
6 dozen times we have asked for that from the defense.

7 Q. You testified in your deposition that maybe two or
8 three times you asked it?

9 A. Yes, sir. Less than half a dozen times.

10 Q. How many trials have you prosecuted?

11 A. I would have no way of knowing. Many, many
12 hundreds.

13 Q. Hundreds?

14 A. Several hundred, yes.

15 MR. REDICK: That is all the questions I
16 have.

17 THE COURT: All right. Mr. Baker, did you
18 have anything?

19 MR. BAKER: Nothing further.

20 THE COURT: Thank you, General Zimmermann.
21 I appreciate your time.

22 A. May I be excused?

23 THE COURT: I believe this witness is not
24 going to be recalled in any fashion, is that right?

25 MR. BAKER: No, Your Honor. If we do we

1 will get in touch with him. Unless something develops
2 today or at a later stage. We can get in touch with Mr.
3 Zimmermann. He is free to go.

4 THE COURT: You are released from your
5 subpoena. If Mr. Baker wants to recall you, he can have
6 a conversation with you.

7 A. Thank you.

8 THE COURT: Thank you.

9 We have reached the noon hour. We have
10 two other witnesses as I recall. We have Mr. Ross
11 Alderman and Mr. Stephenson.

12 Who are you going to call next? We are
13 going to take a lunch break. I want to know what the
14 plan is.

15 MR. MACLEAN: Your Honor, our next witness
16 will be Ross Alderman. I would estimate that his
17 testimony will take a half hour. That is my estimate.
18 And then Mr. Stephenson will be our next witness after
19 that. I know he has a flight schedule.

20 MR. REDICK: His flight leaves at six ten,
21 Your Honor.

22 THE COURT: It doesn't seem like we will
23 run into a transportation problem then. Is it your plan
24 to put Mr. Alderman on next?

25 MR. REDICK: Yes.

1 THE COURT: Is he available at one
2 o'clock?

3 MR. MACLEAN: He is out in the hall. I
4 can check, Your Honor.

5 THE COURT: Why don't you step out and
6 check and see if he has some kind of conflict and if it
7 is going to take an hour, we can go ahead and do it.

8 MR. MACLEAN: Mr. Alderman advises me he
9 is available at one o'clock or now, whatever the Court
10 pleases.

11 THE COURT: Let's go ahead and do him
12 then.

13 Step forward and raise your right hand,
14 please.

15 (Whereupon, the witness was duly sworn.)
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EXAMINATION OF ROSS ALDERMAN

BY MR. MACLEAN:

Q. You are Ross Alderman?

A. That's correct.

Q. Mr. Alderman, you are an attorney here in Nashville, correct?

A. Yes.

Q. And you are duly licensed to practice law?

A. Yes.

Q. How long have you been an attorney?

A. Since 1976.

Q. Where are you employed now?

A. I am employed the with the Metropolitan Public Defender's Office.

Q. What is your position?

A. Deputy Public Defender.

Q. How long have you been there?

A. A total of probably almost 14 years now. I have been there several times but total about 13 or 14 years.

Q. Were you employed at the Public Defender's Office as a public defender back in 1986, '87?

A. Yes, sir.

Q. Are you familiar with the James Jones' case?

A. Yes.

Q. Did you represent Devalle Miller, the co-defendant

1 in the case?

2 A. I did.

3 Q. And you brought today your file on that case?

4 A. Yes.

5 Q. From looking at your file, can you tell the court
6 when Devalle Miller was booked into the Metropolitan
7 Davidson County Jail?

8 A. The file reflects his date of arrest being April
9 22, 1987.

10 Q. He was originally arrested up in Pennsylvania, is
11 that correct?

12 A. That is my understanding.

13 Q. He was brought down and booked in Nashville on
14 April 22?

15 A. Right.

16 Q. Now, can you tell from your file when his first
17 scheduled court appearance was on the jail docket?

18 A. What I have got to do is find the document where
19 an evaluation was ordered off of the jail docket. It
20 looks like April 24. That would be when he appeared on
21 the jail docket.

22 Q. Explain what the jail docket is?

23 A. A General Sessions docket in Davidson County where
24 individuals who are arrested on an arrest warrant as
25 opposed to an indictment appear if they don't make bond

1 following their arrest.

2 Q. Was Mr. Miller arrested on an arrest warrant?

3 A. Yes.

4 Q. Was he able to make bond?

5 A. No.

6 Q. Was Mr. Miller indigent?

7 A. Yes.

8 Q. Tell the Court, explain to the Court what the
9 standard procedure was in 1987 in Davidson County for
10 a defendant who had been arrested and unable to make
11 bond?

12 A. Normally someone who is arrested and did not
13 make bond would be scheduled for the jail docket probably
14 within two or three days after their arrest, depending
15 on what day of the a week the arrest occurred. They
16 would appear there.

17 If they had a lawyer, if they retained
18 counsel, then the public defender would not represent
19 them. If they were in jail unable to make bond and did
20 not have a lawyer they were going to retain then by
21 default the Public Defender's Office would represent
22 them, unless there was a conflict, we would get another
23 lawyer.

24 They would be assured counsel on the jail
25 docket if they didn't retain counsel.

1 Q. From the period of arrest on the arrest warrant
2 until jail docket, generally if he was indigent, didn't
3 have outside counsel, he wouldn't be represented by
4 counsel during that time?

5 A. Normally that is true.

6 Q. He would be assigned counsel at the jail docket?

7 A. Yes.

8 Q. And typically at that point in time it would be a
9 period of two or three days?

10 A. Yes.

11 Q. That was the standard procedure?

12 A. Yes.

13 Q. Was that standard procedure common knowledge among
14 the criminal bar?

15 A. Yes. It had been the procedure for a long time.
16 I assume it was common experience.

17 Q. When Mr. Miller appeared at the jail docket on
18 April 24, 1987, was he assigned an attorney from the
19 Public Defender's Office?

20 A. Yes.

21 Q. That was the first time he was assigned an
22 attorney?

23 A. According to any information I have got that is
24 first time he met an attorney from our office.

25 Q. To the best of your knowledge, from the time of

1 his arrest on April 22 to April 24, the jail docket, he
2 was not represented by counsel?

3 A. That's correct.

4 Q. This case -- that two-day period was a typical
5 period of time?

6 A. Yes.

7 Q. Now, I would like for you to look at Exhibit 51.
8 We have some exhibit binders there. It is in the first
9 volume.

10 A. The transcript of interview?

11 Q. There is the copy we obtained out of the District
12 Attorney's file.

13 If you will turn to the fourth page which
14 is date stamped 143 that begins with the actual
15 transcript itself.

16 A. Yes.

17 Q. Is a copy of that transcript in your files?

18 A. Yes.

19 Q. Did you receive a copy of that before the James
20 Jones' trial?

21 A. Yes, sir.

22 Q. And that is the transcript of the interview that
23 was conducted by Mr. Zimmermann and Mr. Garafola of
24 Devalle Miller, correct?

25 A. Yes, sir.

1 Q. And this interview occurred on that one day
2 between the day of his arrest here in Nashville and the
3 day of his first court appearance?

4 A. That is my understanding, yes.

5 Q. That occurred before he was assigned an attorney
6 from your office, right?

7 A. Yes, sir.

8 Q. Is it fair to say that it was common knowledge at
9 that time that Mr. Miller would have been expected he
10 would have had counsel within a day or two of the day of
11 that interview?

12 A. I believe that to be true, yes, sir.

13 Q. Was anyone from the Public Defender's Office
14 present when this interview took place?

15 A. No, sir.

16 Q. If you had been representing Mr. Miller at the
17 time, would you have insisted on being present during
18 that interview?

19 A. Yes.

20 Q. Who is Mr. Paul Newman?

21 A. He is currently Assistant District Attorney in
22 Murfreesboro. At that time he was Assistant Public
23 Defender at our office.

24 Q. Is he a member of your office who was originally
25 assigned?

1 A. He was assigned to the jail docket on the 24th of
2 April, 1987 and picked up the case at that point.

3 Q. Subsequently you became involved?

4 A. Yes. I believe after the arraignment in criminal
5 court, I became involved.

6 Q. Did you keep a record of the time you spent on
7 this case?

8 A. From shortly after the arraignment on, yes, sir.

9 Q. Do you have that in your file with you?

10 A. Yes, sir.

11 Q. When was your first involvement in this case where
12 you represented Mr. Miller?

13 A. My time sheet reflects the arraignment occurred on
14 May 8th of 1987. I may or may not have met Mr. Miller
15 prior to that. That is the first entry in the file.

16 Q. Did you represent Mr. Miller from that point on
17 through his sentencing hearing?

18 A. Yes, sir.

19 Q. Were you out of the country for part of the month
20 of June, 1987?

21 A. Mid June through very early July '87, yes, sir.

22 Q. And when you left the country, were you aware that
23 the Jones' trial was set to begin sometime in July?

24 A. Yes.

25 Q. Did you know the prosecution intended to use your

1 client, Mr. Miller, as a witness at the Jones' trial?

2 A. Yes, sir.

3 Q. Did you know that the prosecution would want to
4 talk to Mr. Jones prior to the trial?

5 A. Yes, sir.

6 Q. Probably when you were out of the country?

7 A. Yes.

8 THE COURT: Mr. Jones or Miller.

9 MR. MACLEAN: Mr. Miller. I am sorry.

10 Q. Did you know the prosecution would want to talk to
11 Mr. Miller prior to the trial, while you were out of the
12 country?

13 A. Yes.

14 Q. Did you ask Mr. Paul Newman to cover for you if
15 that should occur?

16 A. Yes.

17 Q. According to your records or the records in the
18 Public Defender's file, did the prosecution talk to
19 Devalle Miller while you were away?

20 A. Yes, sir, they did.

21 Q. Do you recall when that was?

22 A. I don't have a specific date. I believe I had a
23 note at one time that I had gotten back from Paul Newman
24 reflecting there had been a conversation.

25 I remember there was one because I

1 remember that having occurred in my absence.

2 Q. Would that have occurred in mid June sometime?

3 A. Mid to late June, yes, sir.

4 Q. Now, after you returned from your trip and shortly
5 before the trial, did you have a conversation with Mr.
6 Zimmermann about Mr. Miller's statement, the statement
7 that is part of Exhibit 51?

8 A. About the transcript?

9 Q. Yes.

10 A. Yes, sir, we had conversation about that.

11 Q. Did you tell Mr. Zimmermann there were
12 discrepancies between his version of what happened at
13 that point in time as compared to the version he set
14 forth in the April 23rd interview?

15 A. My recollection is that I told Mr. Zimmermann
16 there had been a change in what Mr. Miller would now say
17 if he testified.

18 Q. Did Mr. Zimmermann have further meetings with Mr.
19 Miller prior to the time that Mr. Miller gave his
20 testimony in the Jones' case?

21 A. Yes, sir.

22 Q. What was the purpose of those meetings?

23 A. To prepare Mr. Miller to testify at the trial.

24 Q. Did you attend those meetings?

25 A. Yes, sir.

1 Q. Do you recall those meetings?

2 A. Yes, sir.

3 Q. Do your time records reflect when those meetings
4 occurred?

5 A. Excuse me. July 6, 7, 9 and 12.

6 Q. The record in this case reflects that the trial
7 began on July 6th with jury selection and that it
8 continued through that week and that the guilt phase was
9 on July 13 and 14, which was a Monday and Tuesday, and
10 that the sentencing hearing was on July 15th, a
11 Wednesday.

12 So, your testimony is that your records
13 reflected that Mr. Zimmermann met with Devalle Miller to
14 prepare his testimony on July 6, July 7 and July 9, which
15 would be the time of the jury selection process, and then
16 on July 12th, which was the evening or day before the
17 actual guilt phase began.

18 Is that correct?

19 A. Yes. That is what my record reflects.

20 Q. What do your time records reflect about the July 6
21 meeting?

22 When during the day did that occur?

23 A. Records don't reflect but each of these meetings
24 with the exception of the one on the seventh, I believe,
25 occurred in the evening after court.

1 Q. Where was the July 6 meeting?

2 A. In the District Attorney's Office in a conference
3 area in the library.

4 Q. According to your time records, how long did that
5 meeting last?

6 A. Three point four hours.

7 Q. What do your time records reflect about the July 7
8 meeting?

9 A. That it was at Detective Garafola's office and
10 lasted three and a half hours.

11 Q. Was Mr. Zimmermann present at that meeting as
12 well?

13 A. Yes.

14 Q. What do your time records reflect about the July 9
15 meeting?

16 A. That it was again in the conference area of the
17 D.A.'s office and lasted three point six hours.

18 Q. What do your time records reflect about the July
19 12 meeting?

20 A. That it lasted two and a half hours and began in
21 the D.A.'s office.

22 Q. Does that mean during those four days the meetings
23 lasted a total of 13 hours?

24 A. Whatever the math is on that, yes, sir. I was
25 trying to do it and I am not doing a good job adding it

1 up in my head. It is 13 hours yes, sir.

2 Q. That would be in addition to the mid June meeting
3 with Mr. Newman?

4 A. Right.

5 Q. That would be in addition to the April 23
6 interview that is reflected in this transcript?

7 A. Yes, sir.

8 Q. Who is Eddie Barnard?

9 A. He was an assistant district attorney with
10 Davidson County in 1987. He is in another county now.

11 Q. Was he involved in this case with Mr. Zimmermann?

12 A. Yes.

13 Q. I believe his name is Weakley?

14 A. Weakley Edward Barnard.

15 Q. Was Mr. Barnard present during any of the
16 meetings?

17 A. He was present during some of them or some part of
18 each of them. I don't recall specifically whether he was
19 there for every minute of every one.

20 Q. Did you take notes during the meetings?

21 A. No.

22 Q. Do you recall all the details of what was
23 discussed at the meetings?

24 A. Not each and every detail, no.

25 Q. Do you remember thinking at the time that the

1 prosecution was spending a considerable amount of time
2 with Mr. Miller in preparing his testimony?

3 A. It seemed like a long time, yes, sir.

4 Q. Do you recall Devalle Miller's version of the
5 story or how he was involved, during the course of the
6 interviews?

7 A. Yes, sir.

8 Q. Do you remember the prosecution explaining to Mr.
9 Miller what other witnesses were expected to say in their
10 testimony at trial?

11 A. Yes, sir.

12 Q. Do you recall that there were significant
13 discrepancies between the version of the facts described
14 by Mr. Miller in these meetings and the version he gave
15 in his April 23rd statement?

16 A. Yes, sir.

17 Q. Do you recall what all those discrepancies were?

18 A. Not detail by detail, no, sir.

19 Q. Can you give the court some idea?

20 A. The general discrepancy had to do with Mr.
21 Miller's description of what his actual involvement in
22 the offense at issue in the trial had been and what his
23 knowledge prior to that event had been, how much he knew
24 was allegedly going to happen or what was going to happen
25 during the events.

1 Q. In these meetings do you recall whether Mr. Miller
2 discussed with the prosecution the group that has been
3 referred to as the Southeastern Gospel Ministry?

4 A. Yes.

5 Q. What do you recall now about what was said by Mr.
6 Miller to the prosecution during these meetings about
7 that organization.

8 MR. BAKER: I object as hearsay.

9 MR. MACLEAN: This goes to the question of
10 what kind of information the prosecution had, which I
11 think goes to Brady issues and goes to potentially other
12 issues.

13 THE COURT: What about the hearsay
14 objection?

15 MR. MACLEAN: We are not submitting this
16 to prove --

17 MR. BAKER: We can call Mr. Miller in here
18 and ask him.

19 MR. MACLEAN: This goes to the Brady
20 issue.

21 THE COURT: I am going to sustain the
22 objection.

23 Go ahead and ask him and put it in the
24 record.

25 Q. Do you recall now what was said by Mr. Miller in

1 theses meetings about this organization?

2 A. My recollection is that he described what I
3 understood to be really sort of a paramilitary arm, to
4 use the phrase, I thought at the time of the Gospel
5 Ministry, a group that Mr. Miller described as being
6 recruited into. I am not sure who recruited him.

7 And it had sort of a boot camp structure
8 to it, broken up into squads and he was supervised by Mr.
9 Jones. Their purpose being, as Mr. Miller understood it,
10 to clean up the community -- the black community is what
11 they were discussing at the time -- having to do with
12 criminal elements and drug dealers, et cetera.

13 They had training in how to be
14 paramilitary, is the best way I can describe it.

15 Q. Did he describe how this group had been involved
16 in some of the events leading up to the events.

17 MR. BAKER: I object to hearsay.

18 THE COURT: Same ruling. Go ahead.

19 A. He described the planning of these kind of actions
20 that had arisen from the group. That was the idea, to
21 drive drug dealers out of the community through, I guess,
22 harassment is the best term.

23 Q. Did Mr. Miller identify any of the other members
24 of this group during these discussions with the
25 prosecution?

1 A. He identified several people. The names I recall
2 are a Mr. Boyd and Mr. Beard and Mr. Hollie.

3 Q. Did Mr. Miller express concern or fear what these
4 other men might do?

5 A. He described some concern that they would know
6 what he was testifying about either because they were in
7 court or had people who were going to be in court and
8 they might take some action to punish him or hurt him or
9 his family.

10 Q. In these meeting, did Mr. Barnard make a comment
11 about Mr. Lionel Barrett's knowledge or lack of knowledge
12 about the facts of the case?

13 A. In one of the meetings Mr. Barnard mentioned that
14 he was surprised how little Mr. Barrett apparently knew
15 or was aware of.

16 MR. BAKER: I object.

17 THE COURT: There is a hearsay objection.
18 What is the response.

19 MR. MACLEAN: Your Honor, I think this is
20 evidence of what Mr. Barrett knew or didn't know, the
21 fact it was announced by the prosecution to Mr. Alderman
22 that it appeared Mr. Barrett didn't know much.

23 I think that is evidence that he would
24 announce that --

25 THE COURT: I am not doubting it might be

1 evidence. Is it admissible? It is hearsay. Is there an
2 exception?

3 MR. MACLEAN: No, Your Honor.

4 THE COURT: Okay. Sustained.

5 Q. Did you give a copy of Miller's April 23rd
6 statement, this transcript which is an exhibit to Mr.
7 Barrett or anyone acting on Jones' behalf?

8 A. No.

9 Q. Why not?

10 A. I felt that if they had the statement they would
11 be better able to cross-examine Mr. Miller which would
12 not assist him either as my client or as the state's
13 witness.

14 I didn't want to at the time get crosswise
15 with the prosecutor's office when I was trying to
16 negotiate a settlement for Mr. Miller.

17 Q. Did you believe that the April 23rd statement
18 could have been used on cross-examination at the Jones'
19 trial to impeach Mr. Miller?

20 A. That is what I assume, yes, sir.

21 Q. Did you negotiate a plea agreement on behalf of
22 Mr. Miller in this case?

23 A. Yes, sir.

24 Q. Would you look at page -- Exhibit 92 that is in
25 the other volume.

1 A. A letter from John Zimmermann to me.

2 Q. Does this letter set forth the terms of the
3 agreement that you reached on behalf of Mr. Miller with
4 the state?

5 A. Yes, sir.

6 Q. And in this letter, what is it that Mr. Miller is
7 agreeing to do?

8 A. He is agreeing to several things. He is agreeing
9 to testify truthfully, waiving his right against double
10 jeopardy by entering the agreement and agreeing that if
11 he is required or his testimony is required in future
12 proceedings regarding Mr. Jones that he will testify
13 truthfully in those proceedings as a condition of this
14 plea agreement.

15 Q. What does it mean in here, or your understanding
16 of the agreement where he says he is waiving his rights
17 against double jeopardy?

18 A. At the time and now my understanding was and is
19 that if at some point they decided that he did not
20 testify truthfully, they would attempt to set aside the
21 plea agreement and take him to trial.

22 Q. What is it that the state agreed to do under this
23 agreement?

24 A. They agreed to not seek the death penalty against
25 Mr. Miller.

- 1 Q. Did they agree to reduce charges?
- 2 A. At this point?
- 3 Q. Yes.
- 4 A. No, sir.
- 5 Q. Would you look down there --
- 6 A. I am sorry. Look at -- yes, enter a plea of
- 7 guilty to first degree murder, as to what was in the
- 8 first degree murder count and to dismiss the charges of
- 9 assault with intent as to Norma Norman.
- 10 Q. Will you look at Exhibit 44, please, the
- 11 indictment.
- 12 A. Yes, sir.
- 13 Q. Exhibit 44, if you look at the upper left-hand
- 14 corner -- you have to turn the notebook around
- 15 sideways.
- 16 A. Yes.
- 17 Q. Can you see what counts there were against Mr.
- 18 Miller in the indictment?
- 19 A. Yes. Jointly indicted with Mr. Jones, murder in
- 20 the first degree, assault with intent to commit murder in
- 21 the first degree with bodily injury and armed robbery.
- 22 Q. Under the agreement, those three counts were
- 23 reduced to two counts, one was second degree murder and
- 24 other was armed robbery, is that correct?
- 25 A. Yes, sir.

1 Q. Would you turn to Exhibit Number 93, please.

2 A. All right.

3 Q. Exhibit 93 is the sentencing hearing in Mr.
4 Miller's case that occurred on December 15, 1987, is that
5 right?

6 A. Yes, sir, appears to be. The front page I have
7 says plea of guilty proceeding and sentencing hearing.

8 Q. That was for your client, Mr. Miller?

9 A. Yes, sir.

10 Q. And you attended that hearing, did you not?

11 A. Yes, sir.

12 Q. Was Mr. James Jones represented at that hearing?

13 A. No, sir.

14 Q. Who represented the state at that hearing?

15 A. Mr. Zimmermann.

16 Q. Will you turn to page eight of that transcript.

17 A. All right.

18 Q. Can you see at the top of page eight what appeared
19 to be the ranges of the sentences that could be imposed?

20 A. Ten to 35 years.

21 Q. That was your understanding at the time?

22 A. Yes.

23 Q. Based upon the plea agreement?

24 A. Right.

25 Q. It would be up to the court to decide what

1 punishment to impose within that range if the court
2 accepted the plea agreement?

3 A. Yes.

4 Q. Would you look at pages 20 to 21.

5 A. All right.

6 Q. And do you see the testimony of Karen Miller
7 starting at line 12 through the top of page 21 to line 4?

8 A. I am making sure it is Karen Miller.

9 Right.

10 Q. Is that the testimony of Karen Miller?

11 A. Right. I put it back a few pages to make sure I
12 knew who it was.

13 Q. You were questioning Karen Miller?

14 A. I think at this point it is cross-examination.

15 Q. This is cross-examination by General Zimmermann,
16 correct?

17 A. Looks like it might be cross-examination by the
18 court. She was being examined.

19 Q. Can you read to the court the testimony from line
20 12 through line four on the next page.

21 A. Was your husband involved in an organization
22 that -- that apparently was aimed toward trying to clean
23 up the community?

24 Answer. Yes.

25 Question. You were aware of that?

1 Answer. Yes.

2 How did he get involved in that?

3 Answer. James Jones.

4 Did he talk to you about being involved in
5 it?

6 Answer. Yes.

7 Did he tell you what he thought they were
8 going to try and do with your organization?

9 Answer. Yes.

10 What did he tell you they were trying to
11 do?

12 Answer. Get rid of all the drug pushers
13 in Nashville. This was all coming from James Jones. Get
14 rid of all the drug pushers in Nashville, clean up the
15 streets and, you know, just stuff like that.

16 Q. Would you turn to page 24.

17 A. Yes.

18 Q. Down toward the bottom of page 24, is that the
19 beginning of Mr. Miller's testimony at his sentencing
20 hearing?

21 A. Yes, sir.

22 Q. And pursuant to the agreement with the state he
23 was to testify truthfully and if not, if the state felt
24 he was not testifying truthfully they could change their
25 deal with him, correct?

1 A. That was the understanding, yes.

2 Q. Could you read the testimony beginning at line 21
3 of the bottom of page 24 through line two at the top of
4 26?

5 A. Question. Mr. Miller, the judge heard you testify
6 at trial so he knows what you did.

7 Why did you do it?

8 Answer. The organization that I gotten
9 myself involved in was to help the community to rid the
10 drug dealers and things like that. You know, because it
11 was a bad influence. And I just got in over my head as
12 far as understanding the possible criminal implications
13 that are now involved.

14 Q. Keep reading.

15 A. Question. Well, obviously you knew that it was
16 against the law to kill somebody.

17 Answer. Yes.

18 Question. You knew that and you knew it
19 was against the law to rob somebody?

20 Answer. Yes, sir.

21 Question. Did you believe James Jones
22 when he said you all were going to kill the witnesses
23 after that robbery?

24 Answer. No, not really.

25 Question. What did you think he meant?

1 Answer. Maybe beating them up or
2 something like that. But killing someone to me was just
3 abstract and it was something I didn't think he would do.

4 Do you want me to read?

5 Q. Keep reading to line two of the next page.

6 A. I am sorry.

7 Question. You never have seen anybody
8 die?

9 Answer. No.

10 Question. When you got to the home of
11 Norma Norman and Patrick Daniels, you were carrying a
12 gun?

13 Yes.

14 Was the gun loaded?

15 No, it was not.

16 Question. Where had you gotten that
17 gun?

18 Answer. As I stated in the trial before,
19 a guy by the name of William Beard also part of the
20 organization had given it to me.

21 Q. Okay. Thank you.

22 In this sentencing hearing, what was your
23 strategy? What were you trying to do to get a lower
24 sentence for Mr. Miller?

25 A. Attempting to convince Judge Kurtz that Mr.

1 Miller's involvement had been less substantial than Mr.
2 Jones, that Mr. Miller had been led or dominated by Mr.
3 Jones so as to mitigate Mr. Miller's sentence.

4 Q. Again, Mr. Jones was not present at this hearing?

5 A. No, sir, I don't believe he was.

6 Q. Will you turn to page 44, please.

7 A. All right.

8 Q. Page 44 I believe is the -- starting at the bottom
9 of page 43 and to the top of page 44 --is the statement
10 of the court toward the end of the sentencing hearing,
11 correct?

12 A. Yes.

13 Q. You can start with line 25 on the page before and
14 just, if you would, please read through line 17 on page
15 44.

16 A. All right. The court. Well, let me say this to
17 start with. Some of the matters that Mr. Alderman
18 pointed out in favor of his client are exactly correct.
19 The fact that he was the weaker of the two individuals
20 and the fact he cooperated fully with the police once he
21 was apprehended, and first of all, it should be noticed
22 that those factors which affected the state in its
23 decision, related to the reduction of this, and the fact
24 that there would be no effort to seek consecutive
25 sentencing in this case.

1 But I will set that aside, park it over to
2 the side, because I still consider those obvious factors
3 as they relate to the sentencing decisions that I make.

4 In this case I have considered the
5 circumstances of the offense, and I won't repeat what I
6 said earlier, but I think it is obvious to everybody that
7 was involved in this case that this was one of most
8 horrible crimes committed this this community.

9 Q. Do you recall what the sentence was that Judge
10 Kurtz imposed?

11 A. Yes. 25 years at 30 percent on each of the two
12 counts and ran them concurrent.

13 Q. And I believe that is reflected on page 47,
14 correct, at the bottom?

15 A. Yes, sir.

16 Q. And what was your position with regard to that
17 sentence?

18 A. I appealed.

19 Q. You thought it was too high?

20 A. Yes.

21 MR. MACLEAN: One second, Your Honor.

22 That is all, Your Honor.

23 THE COURT: Mr. Baker.

24

25

1 EXAMINATION OF ROSS ALDERMAN

2 BY MR. BAKER:

3 Q. Mr. Alderman, Mr. Miller testified at Mr. Jones'
4 trial.

5 Were you present when he testified?

6 A. I was present outside the courtroom. I was
7 sitting listening on a speaker phone.8 Q. And you were present when Mr. Miller testified
9 later at the sentencing hearing?

10 A. Yes, sir.

11 Q. And as an officer of the court, you would not
12 permit a fraud on the court, would you?

13 A. No, sir.

14 Q. And so it was your belief that your client was
15 presenting truthful testimony, correct?

16 A. Yes, sir.

17 Q. Now, at his trial on cross-examination and maybe
18 even in direct examination he stated inconsistencies
19 about his first statements to the police and then what he
20 later said were not true, correct?

21 A. I don't understand the question.

22 Q. Let me rephrase it. Mr. Miller at trial testified
23 regarding prior inconsistencies in his statement. Do you
24 recall that?

25 A. Difference between what he told the police April

1 23rd and what he told the jury, yes.

2 Q. You stated you approached the District Attorney
3 and told him that Miller had some changes to his
4 story?

5 A. Right, yes, sir.

6 Q. And that prompted further meetings with the
7 District Attorney's Office?

8 A. I don't know what prompted, but I told them and
9 then we had the meetings.

10 Yes, there was that.

11 Q. Don't you think if a defense attorney goes to a
12 prosecution and makes a statement like that and the
13 prosecution is not going to want to find out what the
14 person's story is and determine what is true and not
15 true?

16 A. I wasn't suggesting that. What I am saying, I
17 don't know how much of the meeting during the jury
18 selection related to inconsistency or related to
19 preparation of the trial.

20 Q. In fact, they would be derelict in their duties if
21 they didn't do that?

22 A. They prepared him to testify. Before he
23 testified, I told them I thought he would say something
24 different than what they thought.

25 MR. BAKER: That is all.

1 THE COURT: Any redirect?

2 MR. MACLEAN: No, Your Honor. That is
3 fine.

4 THE COURT: Mr. Alderman, thank you.

5 We are going to break for lunch unless
6 there is anything we need to take up before that.

7 MR. BAKER: Nothing from the state, Your
8 Honor.

9 THE COURT: It is now 20 minutes to one.
10 We will reconvene in an hour at 20 minutes to two.

11 (Whereupon, the Court was in recess.)

12 THE COURT: Are you ready to call your
13 next witness?

14 MR. REDICK: Yes, Your Honor. We will
15 call Brian Stephenson.

16 THE COURT: Come around.

17 (Whereupon, the witness was duly sworn.)
18
19
20
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24
25

EXAMINATION OF BRIAN STEPHENSON

BY MR. REDICK:

Q. You are Brian Stephenson?

A. Yes, I am.

Q. You went to college at Eastern College and graduated Magna Cum Laude with a degree in history and political science in '81, is that correct?

A. That's correct.

Q. And 1985 graduated from the Kennedy School of Government at Harvard University as a Kennedy fellowship in criminal justice award?

A. That's correct.

Q. And also in that same year you graduated with a juris doctorate from Harvard Law School and fellowship in public interest law?

A. That's correct.

Q. And in 1989 you received a Reebok National Human Rights Award, is that correct?

A. That's correct.

Q. In 1991 the ACLU the national liberty metal award?

A. That's correct.

Q. In 1991 the American Bar Association wisdom award for public service litigation?

A. That's correct.

Q. In '93 the Martin Luther King American dream award

1 from the Alabama democratic conference?

2 A. That's right.

3 Q. In '93 you were a nominee as lawyer of the year
4 for the American Trial Lawyers' Association?

5 A. That's correct.

6 Q. In '95 you received a honorary fellow award from
7 the University of Pennsylvania Law School?

8 A. That's correct.

9 Q. In 1994 you received a Thurgood Marshall medal of
10 justice from Georgetown Law School?

11 A. That's correct.

12 Q. In '95 MacArthur foundation award prize?

13 A. That's correct.

14 Q. You are on the board of directors of the Federal
15 Defender Association in the Middle District of Tennessee?

16 A. Yes, I am.

17 Q. You were on the national board of directors of the
18 American Civil Liberties Union from 1992 to 1995?

19 A. That's correct.

20 Q. In 1992 you were on the American Bar Association
21 task force on minorities in criminal justice?

22 A. That's correct.

23 Q. From 1990 to the present you are on the steering
24 committee of the national prison project?

25 A. That's correct.

1 Q. You have written and published several articles in
2 law reviews. I think you have supervised the publication
3 of at least two versions of post conviction manual for
4 practitioners in the state of Alabama?

5 A. That's correct. We actually produced three
6 manuals on post conviction litigation.

7 Q. When was that, do you know?

8 A. First one version came out in 1989. The next
9 version was 1992 and just completed the third edition of
10 that manual actually two weeks ago. It should be out in
11 March.

12 Q. Have you also published, apart from the post
13 conviction manual, a trial defense manual?

14 A. Right. We have a manual the album of capital
15 defense manual that was first published in 1990,
16 published again in '92 and just completed a new edition
17 last August that was released in September, 1997.

18 Q. What is the Alabama Capital Reporter?

19 A. The Capital Reporter is a newsletter that we
20 prepare and distribute to lawyers across the state
21 primarily of Alabama but also across the region. It
22 updates the attorney on recent developments of the United
23 States Supreme Court and Federal Appellate Courts in the
24 area of capital punishment law, that frequently has
25 articles providing defense attorneys with pointers on how

1 to approach certain kinds of issues in capital litigation
2 and updates and keeps practicing attorneys aware of
3 developments in this area of the law.

4 Q. From 1985 to 1990 you were staff attorney for the
5 Southern Center of Human Rights in Atlanta, Georgia?

6 A. That's correct.

7 Q. And '89 to '95 you were the executive director of
8 the Alabama Capital Representation Resource Center in
9 Montgomery, Alabama?

10 A. That's correct.

11 Q. From '95 to the present you were and are the
12 director of the Equal Justice in Montgomery, Alabama for
13 the state of Alabama?

14 A. That's correct.

15 Q. You have held law faculty positions at New York
16 City University School of Law in the spring of '95 and
17 '97?

18 A. That's correct.

19 Q. You held a professor's position at the University
20 of Michigan School of Law in the fall of 1995?

21 A. That's correct.

22 Q. Could you briefly describe for us the work you
23 did during the period of time from 1985 to 1990 while
24 you were employed by the Southern Center for Human
25 Rights?

1 A. While staff attorney for them, I had to handle
2 primarily death penalty cases at all stages at trial on
3 direct appeal and in post conviction all across the deep
4 south.

5 A lot of litigation was in Georgia,
6 Alabama, Mississippi, Louisiana. We got calls from all
7 over the region and got involved in cases, depending on
8 the circumstances of the case and our caseload.

9 Q. From 1989 to 1995 as the director of the Alabama
10 Capital Representation Resource Center in Montgomery,
11 what capacity were you employed there?

12 A. I was the director and directed litigation on
13 behalf of death row prisoners in the state of Alabama.

14 We also had a trial and appeal unit that
15 provided legal representation to capital defendants at
16 trial and death row prisoners on direct appeal to the
17 state appellate courts in Alabama.

18 Q. How large was your staff at the Alabama Capital
19 Representation Resource Center?

20 A. It varied depending on funding. There were times
21 when we had as few as five attorneys and other times we
22 had as many as nine attorneys.

23 Q. You did exclusively death penalty defense work?

24 A. That's correct.

25 Q. At the equal justice initiative, what kind of work

1 do you do there and how has it changed from the work you
2 were doing before?

3 A. We continued to provide primarily legal assistance
4 to capital defendants and death row prisoners. We have a
5 smaller budget and, therefore, smaller staff than we used
6 to at the Resource Center.

7 But we essentially provide the same kind
8 of services assisting poor people at trial and post
9 conviction hearings that face death the penalty.

10 We also do some work around juveniles in
11 the court system and two or three civil rights cases.

12 Q. So, you represent only indigent defendants?

13 A. That's correct.

14 Q. What percentage of the members on death row in
15 Alabama are indigent?

16 A. Right now hundred percent. We don't have anybody
17 that retains counsel.

18 Q. How many people are on death row in Alabama?

19 A. 157.

20 Q. Have you in the past attended death penalty
21 representation seminars and workshops and things of that
22 nature?

23 A. Yes.

24 Q. You attended as a trainer?

25 A. That's correct.

1 Q. Can you give us some sort of idea how many you
2 have done?

3 A. Quite a few now. I lecture or teach at, I don't
4 know, 11 or 12 training programs a year for criminal
5 defense attorneys and people working in the death penalty
6 area. I have been doing that for eight or nine years.

7 I sometimes attend -- well over a hundred,
8 I guess.

9 Q. And you have consulted with other attorneys who
10 have cases and you have offered assistance as a
11 consultant?

12 A. That's right. We get calls weekly from attorneys
13 handling cases at the trial level. Lawyers handling
14 cases in post conviction and I spend a lot of time
15 consulting with defense attorneys on strategy in their
16 cases and developing theories of the case, et cetera.

17 That has been true of my practice for the
18 last 10 years.

19 Q. So, you are talking hundreds of cases?

20 A. Yes. It would be hard to quantify. Several
21 hundred, yes.

22 Q. Have you had other experience with death penalty
23 representation issues other than trial or representation
24 in court?

25 A. Yes. I am frequently asked to testify before

1 Congress or participate on missions surrounding criminal
2 justice or the death penalty in other countries. That is
3 something I have done more of in the last four or five
4 years than earlier. I provide those services.

5 Every now and then the court will ask me
6 to look at plans around defense services that might
7 impact capital litigation in certain jurisdictions. If
8 possible, I will provide those kind of services as well.

9 Q. You were first actually counsel of record in a
10 death penalty case in '85?

11 A. That's correct.

12 Q. How many -- in round figures, how many cases have
13 you been counsel of record in?

14 A. Oh, counsel of record probably 70. Sixty or 70
15 cases.

16 Q. Would these cases have been at all stages of
17 litigation?

18 A. That's right.

19 Q. Including trial?

20 A. That's correct.

21 Q. Appeals?

22 A. Yes.

23 Q. State post conviction, federal habeas?

24 A. That's correct.

25 Q. How many states have you represented capital

1 defendants in as counsel of record?

2 A. Most of the states in the deep south. Counsel of
3 record probably five states.

4 Q. These are southeastern states?

5 A. Southeastern states, Alabama, Georgia,
6 Mississippi, Florida.

7 Q. Have you consulted counsel in cases in the State
8 of Tennessee?

9 A. Yes.

10 Q. How many would you say?

11 A. A dozen perhaps. A couple Public Defenders that
12 have consulted with me on cases over the years. Two or
13 three where I was activity involved as an expert witness.
14 I would say maybe 10 or 12.

15 Q. Have you testified as an expert in death penalty
16 cases on the issues of ineffective assistance of counsel
17 before?

18 A. I have, yes.

19 Q. Do you have any idea how many times you have done
20 that?

21 A. On the issue of ineffective assistance of counsel,
22 five or six times perhaps.

23 Q. Have you testified as an expert on ineffective
24 assistance of counsel issues in the State of Tennessee?

25 A. I have, yes.

1 Q. Now, concerning the records that you have reviewed
2 in this case, Mr. Stephenson, you reviewed the trial
3 record, have you not?

4 A. Yes.

5 Q. You revealed the appellate record and post
6 conviction record?

7 A. Yes.

8 Q. You reviewed the entire state court record?

9 A. That's correct.

10 Q. That included the transcripts of evidence in the
11 technical record, of the pleadings filed at all stages of
12 litigation?

13 A. That's correct.

14 Q. You have seen the exhibits that were included
15 within the appellate record?

16 A. That's correct.

17 Q. You have seen the memorandum opinion that was
18 filed by the trial court on post conviction?

19 A. Yes. And appellate court opinions.

20 Q. And you have had an opportunity to review the
21 appellate briefs filed by the parties, I take it?

22 A. I have, yes.

23 Q. You have seen the amended petition that was filed
24 in federal court by the petitioner in this case?

25 A. Correct.

1 Q. You have seen a life history of the petitioner
2 including a summary of his institutional record and
3 previous mental evaluation?

4 A. That's correct.

5 Q. That has come in several forms including a social
6 history prepared by Dr. Diana McCoy?

7 A. Yes.

8 Q. You have seen the reports of Dr. Sadoff and Dr.
9 McCoy filed in this case?

10 A. I have.

11 Q. You have seen excerpts from the 1970 and 1972
12 criminal convictions introduced as aggravating
13 circumstances in this case?

14 A. That's correct.

15 Q. You have reviewed the state death penalty
16 statute?

17 A. Yes.

18 Q. You are familiar with relevant state and federal
19 judicial opinions?

20 A. Yes.

21 Q. And you have reviewed the exhibits that were
22 anticipated to be introduced in this evidentiary
23 hearing?

24 A. That's correct.

25 Q. A lot of which are part of the state court

1 records?

2 A. That's correct.

3 Q. Are you familiar with the legal standard that
4 would apply in this case?

5 A. Yes, I am.

6 Q. Could you just in general terms tell us what it
7 is?

8 A. Yes. Claims of ineffective assistance of counsel
9 are generally governed by the United States Supreme Court
10 decision in Strickland versus Washington.

11 The court in Strickland created a two
12 prong test that first looks at counsel's performance. If
13 judgment is made that counsel's performance was deficient
14 then it requires a court finder to make a determination
15 whether there was any prejudice and whether that
16 deficient performance created a reasonable probability of
17 out come, counsel's performance might have affected the
18 outcome of the case.

19 Q. On a more local level, are you familiar with the
20 standard that applied to counsel in this case in '87?

21 A. Yes. The mid '70s the Supreme Court in Baxter
22 versus Rose abandoned what was known as the farce and
23 mockery rule concerning claims of ineffective assistance
24 of counsel, following the lead of the district court of
25 appeals in a case called Beasley.

1 What the court did was what a lot of
2 states did at that time, looked at the ABA standards on
3 what lawyers should be doing in these kind of cases and
4 adopted those standards as the mechanism for evaluating
5 the performance of counsel in capital cases.

6 Q. And you are referring to Baxter versus Rose in
7 '75, Tennessee Supreme Court case?

8 A. That's correct.

9 Q. You have had an opportunity to review that
10 case?

11 A. Yes.

12 MR. REDICK: Your Honor, I wonder if
13 Exhibits 133 and 134 could be passed to the witness.

14 THE COURT: Hand those exhibits to the
15 witness, please.

16 Q. Mr. Stephenson, I will ask you if you can identify
17 these two exhibits and tell us what they are?

18 A. Sure. Exhibit 133 is part of the Tennessee death
19 penalty defense panel manual I think created in 1985 when
20 we -- I worked on a manual out of Georgia in the late
21 '80s, '87 or '88, and I recall our referencing this
22 manual at the time we created that one.

23 Exhibit 134 is a law review article from
24 the Tennessee Law Review that deals with defending death
25 penalty cases in the State of Tennessee with which I am

1 familiar.

2 Q. When was that published?

3 A. Published in the summer of 1984.

4 Q. Do those versions have the statement of the
5 standard of care expected of attorneys at that time.

6 MR. BAKER: I raise an objection. They
7 tendered him as an expert. I had a couple questions I
8 wanted to voir dire the expert about.

9 I would ask that he offer him as an expert
10 and I be provided an opportunity to ask any questions.

11 THE COURT: Mr. Redick.

12 MR. REDICK: I offer Mr. Stephenson as an
13 expert.

14 THE COURT: Mr. Baker, you will have a
15 chance to voir dire the witness.

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EXAMINATION OF BRIAN STEPHENSON

BY MR. BAKER:

Q. Mr. Stephenson, you are personally opposed to the death penalty, correct?

A. In the manner it is currently applied, yes, I am.

Q. And in fact your career has been dedicated to representing capital defendants, correct?

A. Yes. The bulk of my career has surrounded providing services to defendants in capital cases.

Q. That is due in your personal opinion to the opposition of the death penalty?

A. No question I feel the current process of imposing the death penalty is unfair. I have expressed that belief.

Q. On occasions you have been retained as an expert lawyer have you ever in a capital case opined that the defendant received effective assistance of counsel in accordance with the Sixth Amendment?

A. Yes. I frequently have advised lawyers in post conviction that the evidence in my view will not support an ineffectiveness claim and they should be looking for another kind of claim. Quite often that is my advice to counsel.

Q. Have you ever testified as an expert in a case regarding ineffective assistance of counsel which the

1 death penalty was ultimately carried out?

2 A. I am sorry. Have I ever testified --

3 Q. As an expert in a capital case which ultimately
4 the death penalty was carried out?

5 A. No, not to my knowledge.

6 Q. And in the cases you have been retained as an
7 expert, have those cases completed review?

8 A. Not all of them, no.

9 MR. BAKER: Your Honor, I would like to
10 impose at least an objection. The witness has a personal
11 opposition to the death penalty. I think his position on
12 that is clear.

13 He has indicated the organizations and
14 groups he has been involved with in his career that
15 represent capital defendants and also the court is an
16 attorney in this matter.

17 I believe that simply to have a witness
18 lawyer whose position is in opposition to the death
19 penalty to give interpretations on ineffectiveness will
20 not help the court any.

21 I would object to him being an expert.

22 THE COURT: I believe Mr. Stephenson can
23 testify as an expert. The objection is overruled.

24 The points you made about personal
25 opposition to the death penalty as currently applied and

1 his career of advocacy in support of his beliefs go to
2 the weight of the evidence, how it will be perceived.

3 I think somebody that has, I think been
4 counsel of record in 60 to 70 cases that deal with
5 capital punishment, is an expert and it could perhaps --
6 it will assist the court in evaluating the evidence that
7 I have heard.

8 I can distinguish between factual
9 testimony about what this witness believes lawyers should
10 do or shouldn't and this witness' personal beliefs.

11 I don't think anybody could possibly look
12 at this witness and think that he is a right wing
13 conservative that dances to the tune of Rush Limbough and
14 following Newt Gingrich closely.

15 On the other hand, that doesn't mean he
16 doesn't have legal experience and that should be
17 credited. It depends on its own credibility.

18 I am going to allow him to testify as an
19 expert. But acknowledge that he is obviously a person
20 that has strongly held beliefs and acts on those. That
21 is a consideration in whatever color may develop on the
22 testimony.

23 I haven't tried 60 to 70 death penalty
24 cases. I think it will be helpful to hear from somebody
25 that has. It doesn't mean I will agree with him. I am

1 not going to cut him off. It could be helpful to the
2 tryer of fact.

3 Mr. Redick.

4 MR. REDICK: Your Honor, sort of an
5 addition to that, I would say that attorney experts are
6 fairly unique on the question of ineffective assistance
7 of counsel. This is adversarial. He is not only
8 testifying to the qualifications or standards of care in
9 the prosecution of cases. He is offering testimony on
10 the standard of care in defense of cases. The state may
11 perceive that as a bias. That is just his area of
12 expertise.

13 THE COURT: I look at this a lot like a
14 legal malpractice claim. I think an expert witness can
15 testify about it in legal malpractice cases. That is not
16 the test here. This is not a question of negligence. I
17 recognize we have two different things.

18 But the questions of about what is
19 reasonably doable, what the standard practice is and
20 whether the Strickland test is met can be helpful.

21 I will also say that I am going to reach
22 my own opinion whether I think these people were
23 ineffective or not. I will be shocked and amazed if this
24 witness testifies they were effective. I don't think
25 that is why he will be called. I may or may not accept

1 his ultimate opinion.

2 I am interested in hearing what he has to
3 say about how he is going to back up that opinion and
4 what needs to be considered.

5 I think he is an expert and I take it with
6 all the proverbial grain of salt as I do all these
7 people. Everybody has got an agenda of some sort. So,
8 some are harmless and some are not. This one doesn't
9 rise to a level of disqualifying him from being an
10 expert.

11 You can testify.

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EXAMINATION OF BRIAN STEPHENSON

BY MR. REDICK:

Q. Now, Mr. Stephenson, we have heard Judge Campbell here in this hearing say the death penalty cases are different.

I want to ask you some questions about how death penalty cases are different.

If I were to ask you how death penalty cases are different, what is the first thing you think of?

A. The first thing I think of is that they are in effect two cases. They can be two trials. When someone is charged with a capital offense, convicted of a death eligible crime there is a second phase where the jury is going to be asked to make a sentencing determination.

That is fairly unique in criminal litigation. What makes that second phase especially unique is that the jury is going to ask to decide whether the client should live or die. That is a judgment very few people in society ever make.

So, the factual record that needs to be established to aid the court or jury in making that determine is something that is pretty unique in legal practice. Pretty unique in life experience.

And developing that record and doing the

1 kind of investigation necessary to make an effective
2 presentation to the jury is very, very sort of unusual
3 and different in ways that I think a lot of lawyers who
4 handle these cases who have not handled them before find
5 themselves surprised by.

6 Q. You're not contending, Mr. Stephenson, that in
7 death penalty cases or any other criminal case an
8 indigent defendant has the right to the best defense
9 available?

10 A. No. The constitution doesn't guarantee any
11 particular defendant the best defense. The construction
12 guarantees a reasonably effective defense. That is the
13 the relevant standard.

14 Q. So, you understand the questions we are asking you
15 to address is whether or not this defendant in this case
16 received reasonably effective assistance of counsel?

17 A. Absolutely. It is also true that lawyers can
18 disagree about what to do and what they might do, et
19 cetera. That level of disagreement you can get 10
20 different opinions about something.

21 I think the question when you are dealing
22 with ineffective issue is did the lawyer reasonably
23 provide effective assistance of counsel as the courts
24 have interpreted that in the Sixth Amendment.

25 Q. Would you say that what is reasonably effective

1 assistance in a non-capital case may not be in a capital
2 case? It is really two kinds of questions?

3 A. It is indeed. The considerations and presentation
4 and planning and investigation that is just fundamental
5 in death penalty cases may or may not have the same
6 consequences in a non-capital case.

7 But, yes, when you are asked to be in a
8 situation when you have to explain to the jury why this
9 person lives rather than dies, the failure to prepare
10 adequately has consequences that I think are unparalleled
11 in the legal practice.

12 Q. In general terms, for example, what is the
13 difference, if there is any, that you would describe
14 between the investigation that is required in a capital
15 case versus the investigation that is required in a
16 non-capital case?

17 A. Well, you have to do all the things you do in a
18 non-capital case. You have to investigate the crime
19 scene, talk to state witnesses, talk to police officers,
20 you have to gather and have a pretty firm grip on what
21 the state's evidence is, your client's involvement in the
22 crime.

23 What is primarily different at the penalty
24 phase, you will be asked to explain how your client got
25 to the point where the jury is being asked to decide if

1 they live or die. That will require you to know your
2 client's life. And understanding the life history of the
3 family background, understanding if there are emotional
4 or health problems, prior convictions, prior
5 institutionalization, understanding the whole of the
6 client's life becomes critical to you being able to make
7 a determination of what is the best presentation and make
8 that effectively.

9 Q. It is particularly important in death penalty work
10 for the preparation and presentation of counsel to be
11 client centered?

12 A. Yes.

13 Q. What does that mean?

14 A. It means that the lawyer in a death penalty case
15 has a special obligation to create a relationship with
16 the client that allows the attorney to gather the kind of
17 information that is critical.

18 For example, in a lot of non-capital cases
19 finding out your client was abused as a child or your
20 client had prior drug usage or mental health problems or
21 emotional problems, family dysfunction, neglect or abuse,
22 et cetera, may not be a determinative of that
23 effectiveness of that case. In a death penalty case it
24 usually is.

25 Frankly, it is very difficult for a lot of

1 people, indigent people that come in to your office as a
2 client to just sit down at the first meeting and start
3 talking about, yes, I was abused as a child at three or
4 four.

5 A lot of issues you need to cover at a
6 penalty phase of the trial are issues that reveal a lot
7 of ugly stuff, painful stuff for the client and family.

8 People are not going to easily get to the
9 point where they will give that kind of information
10 unless you created a trust and spent some time with
11 them developing an understanding of the importance of
12 that evidence as it relates to the outcome of the
13 proceeding.

14 Q. Does the client's story mean you take everything
15 that your client tells you at face value?

16 A. No. I think you have to approach mitigation and
17 investigate just like you would at the guilt stage. If
18 your client tells you I didn't commit the crime, I was
19 down the street with Sally Jo, you go down and talk to
20 her. And if she doesn't know who your client is, you go
21 back and you don't know if that is true or not. We can't
22 prove that.

23 Same is true in developing life history.
24 Quite often you will get information from a client that
25 is no way reflective or representative of the actual case

1 and actual story.

2 But it is still your obligation to find
3 out what really went on.

4 There are families -- and I have had cases
5 where there was an intense desire to kind of prevent
6 anybody from knowing a lot of the dysfunction, lot of the
7 abuse and terrible things that led to the person being in
8 the situation.

9 But it is counsel's obligation to
10 investigate that.

11 Q. Does this investigation that you have been talking
12 about as well as any other things that are required in
13 preparation for the defense of a capital case at trial
14 require a lot of time and, if so, how much time?

15 What kind of time are we talking about in,
16 general terms?

17 A. Unquestionably. I think because you are perhaps
18 in a situation where you for the first time in this
19 client's life is trying to figure out his life and figure
20 out how he got where he is and pull it apart, it can take
21 hundreds and hundreds of hours.

22 In my office when we prepare for these
23 kind of cases, particularly at the trial stage, we plan
24 on each attorney being available to spend anywhere up to
25 a thousand hours of preparing the case for proceedings.

1 That is just because we know they have to spend a lot of
2 time interviewing family members and gathering records
3 from institutions and talking to employers, school
4 records, military records in addition to the hundreds of
5 hours you typically utilize when preparing for a murder
6 case, crime scene witnesses, police officers, forensic
7 witnesses, et cetera.

8 These cases are very, very time-consuming
9 and extremely labor intensive.

10 Q. Does this collection of documents you are talking
11 about on what scale, are you talking about all the
12 documents that may have any reference to your client that
13 have been kept over his lifetime?

14 A. Well, ideally, yes. It depends on the case and
15 depends on the client.

16 But, for example, if you are trying to
17 prove your client has a mental health problem you will
18 need every document that bears on prior
19 institutionalizations, any evaluations by psychologists
20 or psychiatrists at prior institutions, assessments of
21 guidance counselors sometimes can provide a basis of
22 information, school records, military records, employment
23 records.

24 The reason why it is so important when you
25 talk about mental health problems, you want to get

1 documentation before there was some reason for the client
2 to benefit from his mental health. There is a
3 presumption often times when a capital defendant lawyer
4 starts talking about mental health problems that it is
5 malingering or an excuse or convenient because the client
6 has now done something terrible and they are saying we
7 will start talking about mental health issues for the
8 first time.

9 You want to establish a history of mental
10 illness if that is your focus before the client had a
11 reason to lie, before there was a secondary gain to the
12 development and documentation of that history.

13 All the records become relevant and very
14 important.

15 Q. Is it sometimes difficult to collect these
16 records?

17 A. Often times. If your client didn't spend his or
18 her whole life in the community where you work, it is not
19 easy to just go to the local facilities and gather all
20 the records. It can be time requirements.

21 Different states have different ways of
22 getting records and turnaround time. It can be a very
23 time-consuming process.

24 Q. If you see evidence in the information you have
25 that there may be a mental state defense, would it be the

1 inclination to seek evaluation on your own before you
2 make a decision whether you are going to rely on any kind
3 of mental state defense?

4 A. I think you have to do that. As well educated as
5 attorneys can make themselves about these sorts of
6 issues, we are lawyers, not psychologists and
7 psychiatrists.

8 You know, my staff and I spend a lot of
9 time in DSM 4 and reviewing the literature on mental
10 health defenses and mental health problems and all that.
11 Ultimately you need an expert to guide you in your
12 thinking about the strength or weakness of that
13 assessment or have an assessment.

14 Absent that it becomes very difficult to
15 make a judgment about whether you have a mental health
16 defense or not.

17 Another part, you won't be able to stand
18 up in the courtroom and say my client is psychotic,
19 delusional. You will have to get evidence to support
20 that.

21 Until you start gathering documents and
22 all that, you won't be able to make an informed judgment
23 whether you have that defense available or not.

24 Q. In a state like Tennessee and perhaps Alabama, if
25 you are going to rely upon a mental state defense, you

1 have to give notice of it in advance?

2 A. That's correct. Even more fundamental, you have
3 to investigate it in advance. You don't want to be at
4 the first day of trial figuring out whether you have a
5 mental health defense.

6 If that is something that is going to be
7 part of your case, you need to know that weeks if not
8 months in advance of trial. It will influence everything
9 else you do.

10 I don't see how a lawyer can reasonably
11 prepare voir dire, quite frankly, without being aware or
12 mindful of when there is a mental health defense or not.
13 You ask frequently different kinds of questions.

14 Q. You must assume also, if you are relying on
15 mental state defense and giving notice that you are
16 going to rely on that, that at that time there will be a
17 state evaluation so the state will have the benefit of
18 their expert concerning the mental status of the
19 defendant?

20 A. That's right. Practice in every jurisdiction is
21 that the state will have an opportunity to reevaluate
22 your client and be afforded some opportunity to rebut
23 whatever mental health evidence you intend to present.

24 Q. If that time comes when the state does evaluate
25 your client you would have an opportunity to have input

1 as counsel for that defendant into that evaluation?

2 You could provide them with information
3 and you can consult with them and interview them after
4 the evaluation, can you not?

5 MR. BAKER: I object to leading.

6 THE COURT: Yes, I agree. That is
7 excessive leading.

8 Sustained.

9 Q. Would you think it is appropriate to provide him
10 to state evaluators to assist in their evaluation?

11 A. Yes. Frequently many state mental health
12 facilities will solicit input from defense counsel. You
13 want to make sure any evaluation they make is informed by
14 records that are prior institutionalization.

15 There may be facts that will not be
16 provided by the prosecutor that will be very, very
17 influential in the assessment of your client. You want
18 to make sure any assessment of your client is made with
19 as much information as possible.

20 Because the way mental health evaluators
21 work, they look for history. If you don't make sure they
22 have that history, if you don't provide them with all the
23 facts surrounding the crime and life history and family
24 background, that allows them to see mental illness, you
25 will be doing your client a great disservice.

1 Q. Reasonably show you had -- after their evaluation
2 to ascertain their results and their reasons for results
3 or anything they might say about their evaluation?

4 A. Yes. That includes evaluators who are part of the
5 state evaluation process prior to trial and any other
6 evaluations that have been done previously.

7 Often times you will have records and
8 reports that indicate certain diagnoses but may not
9 indicate all the supporting facts, the witnesses'
10 diagnosis and quite often you will get more if you start
11 talking to them and, people that interview the client
12 previously.

13 Q. In general terms in a typical death penalty case,
14 what type of defense team, if you will, would you expect
15 the attorney to put together?

16 A. Because of the bifurcated nature of the
17 proceeding, guilt and innocence phase and penalty phase,
18 I think most states recognize you need a minimum of two
19 attorneys. These cases particularly when they result in
20 death judgments are in the ordinary course reviewed by
21 courts throughout the system, state appellate courts,
22 Federal District Court, U. S. Supreme Court. There will
23 be three opportunities to review it. They seem to be a
24 lot more paper intensive than non-capital cases.

25 In fact, the Supreme Court throughout the

1 '80s and even throughout most of this decade have been
2 very active in this part of the law. That is creating
3 new constitutional arguments. It is very -- if the
4 lawyer doesn't object contemporaneously or preserve a
5 challenge to some constitutional defect until application
6 of a death penalty, that may be deemed forever barred.

7 Lawyers have a pretty high obligation to
8 litigate all these issues at the trial level and
9 challenge -- constitutional challenges as well as of
10 motions and pleadings.

11 Most jurisdictions require that there be a
12 minimum of two attorneys.

13 Q. Should both of these attorneys have experience in
14 the defense of capital cases?

15 A. Yes. At a minimum counsel should be familiar with
16 all that is required in preparing murder cases for trial.
17 Ideally have some training in special features of the
18 penalty phase litigation on the death penalty.

19 Q. Other than attorneys, what other type of task or
20 individuals do they need to have assisting them in
21 preparing the defense?

22 A. Because of the extensive investigation that
23 will need to be done, you will need an investigator.
24 In addition, as I said, through the traditional tasks
25 that are going to be, crime scene investigation,

1 police/witness investigation, forensic investigation.
2 In addition to all that, there will also be the
3 penalty phase investigation, gathering life history
4 information.

5 And because of that, we clearly
6 recommend that attorneys also have a mitigation
7 specialist or someone whose time is going to be
8 directed toward putting together the life history,
9 family background and kinds of facts that may be --
10 not be determinative of whether the client is guilty or
11 innocent but highly relevant in assessment of whether
12 this person lives or dies.

13 Q. Are the skills and qualification also required in
14 an investigation of the guilt stage different than the
15 skills and qualifications required of an investigation
16 for the sentencing and litigation stage?

17 A. They are. Quite often defense attorneys will use
18 investigators that are at the guilt stage who is
19 concerned with the background, their FBI background.
20 They may not be qualified to do mitigation work. It is a
21 different kind of investigation.

22 When you go into marginal communities and
23 are getting dysfunctional families to talk about behavior
24 and gather records and get to issues like abuse and
25 neglect and abandonment and all that stuff, it is a

1 different function.

2 Quite often the people that do best in the
3 mitigation area of the investigation come at that work
4 with a social work background or background in
5 counseling, psychology or working with families in
6 distress.

7 That may or may not be the kind of person
8 you typically rely upon in your typical crime scene
9 investigation when you are trying to run down a snitch or
10 police witnesses, et cetera.

11 Q. Are attorneys trained in law school or even in
12 charge -- experienced lawyers do the type work required
13 in sentencing mitigation presentation?

14 A. No. I think what has been experienced by me in
15 this area of the penalty phase is pretty unprecedented.
16 Nobody talks to you about putting together a life history
17 and how to uncover evidence of abuse or neglect or
18 identifying signs of mental illness, et cetera.

19 It is one area where there is a real need
20 to rely on expert witnesses when you can get it.

21 Q. So, in performing these tasks you are describing
22 here, how much -- put in dollar terms -- how much money
23 are we talking about to put it together? Let's try to
24 talk about in terms of 1987.

25 A. Well, it is very expensive when you start talking

1 about at least four professionals working on a particular
2 case and talk about spending hundreds and hundreds of
3 hours.

4 You know the prevailing rates of
5 compensation for most of the professionals. You are
6 talking about figures that typically exceed 60 or \$75,000
7 at least in the late '80s.

8 Sometimes you can get folks, full-time
9 defenders that get salaries to do this sort of work and
10 additional expert assistance can do it in a more
11 cost-efficient way.

12 If you are talking about private people
13 coming into this process, you are talking about a process
14 that typically looks at 75, \$80,000.

15 Those are the kind of rates that most
16 attorneys at a minimum were charging for this kind of
17 litigation in the late 1980s, I am aware of.

18 Q. Per attorney?

19 A. Yes.

20 Q. This is not including the cost of extra legal
21 services, investigation and other forensic services?

22 A. That's right. Because those may vary
23 dramatically.

24 If you have a client that spent his whole
25 life right in your community the cost of investigation,

1 gathering records, et cetera is very different than a
2 client like the case at issue that has a life history all
3 over the country. That is going to be particularly
4 expensive.

5 Q. That will increase the cost if you have
6 investigations to be conducted in jurisdictions out of
7 the jurisdiction of the case?

8 A. Unquestionably.

9 Q. Now, let's talk about this case. We have heard
10 testimony and you were aware from your review of the
11 record that trial counsel in this case charged a fee of
12 \$15,000, accepted a retainer of \$5,000 and was paid
13 nothing more.

14 Is this adequate?

15 A. No. I don't see how an attorney in private
16 practice could begin to meet the costs of an effective
17 presentation for \$5,000. I mean, the lawyer's going to
18 be working for less than the federal minimum wage if he
19 spends the amount of time most lawyers spend on these
20 cases.

21 Just the actual cost, the expenses of
22 gathering records and interviewing witnesses,
23 transportation to different places to pick up these
24 things would exceed that amount.

25 I was very surprised to see an attorney

1 representing someone in a capital case with no more than
2 \$5,000.

3 Q. You are aware in this record there has been
4 testimony -- some of it conflicting -- concerns the
5 source of the fee to Mr. Barrett?

6 A. That's correct, yes.

7 Q. And you have had an opportunity to review
8 Tennessee Supreme Court Rule 8 and the code of
9 professional responsibility concerning this issue, have
10 you not?

11 A. I have, yes.

12 Q. Pursuant to the state court of professional
13 responsibility in Tennessee, was counsel required to know
14 the source of the fee or is it enough that he is ignorant
15 of the source to avoid a conflict?

16 A. Tennessee has ruled like most jurisdictions that
17 make it very clear that the attorney shall not accept a
18 fee in a case that comes from someone other than his
19 client unless he has an explicit consent of the client
20 after full disclosure.

21 I think Tennessee's rule is DR 5107 found
22 in most states.

23 No, it is a very, very dangerous practice
24 for an attorney to accept a fee from someone other than
25 the client without talking very, very expressly and

1 directly with the client about that and getting consent
2 after full disclosure.

3 Q. Why is a criminal defense attorney morally
4 obligated to know where the fee comes from?

5 A. Particularly in the criminal area, your obligation
6 is to your client. There are a lot of situations where
7 criminal defendants are getting legal assistance where
8 there are other interests and issues may be floating
9 about.

10 You see a lot in drug cases and conspiracy
11 cases where somebody is footing the bill. They are
12 interested in keeping themselves out of the picture.
13 That is the motivation behind the rule.

14 You don't want the lawyer to feel that his
15 performance or his activities are subject to influence by
16 some outside parties because that outside party is
17 actually paying the money.

18 Q. Or not paying the money?

19 A. Or not paying the money, absolutely.

20 Q. Based upon your review of the record in this
21 case, in your opinion did Mr. Barrett satisfy his
22 obligation to fully disclose to the client the source of
23 the fee?

24 A. Mr. Barrett clearly did not. At best Mr. Barrett
25 did not know the source of the money and at worst did not

1 consciously investigate areas of inquiry because there
2 was an actual conflict.

3 But clearly there was one of the
4 situations where there was evidence from Mr. Jones of
5 other people being involved and those other people being
6 involved being the folks footing the bill.

7 I think there was a very real conflict on
8 part of defense counsel.

9 Q. Based upon your review, did counsel know or should
10 have known the source of the fee?

11 A. He absolutely should have known. I think the rule
12 makes that clear.

13 Frankly, I don't understand part of
14 actually Mr. Barrett's work. Let me start by saying I
15 don't generally think that because a lawyer is
16 ineffective in a particular case that the lawyer is a bad
17 lawyer. That is not my view of Mr. Barrett.

18 This is really one area I don't understand
19 what was happening. Because it doesn't make a lot of
20 sense to me you would accept management and
21 responsibility for a death penalty case for a fee of
22 \$15,000 and get \$5,000 and not do anything because you
23 don't have anymore money and then not inquire as to
24 where the money is coming from.

25 If somebody comes to me and says I want

1 you to represent me and I say it is going to cost a
2 \$100,000, he says I will get it to you because I am
3 going to win the lottery next week, I probably won't
4 take that case. I wouldn't believe it is reasonable
5 for this person to rely on something like that for the
6 money.

7 Most defense attorneys, particularly in
8 these kind of cases -- that can become very expensive --
9 don't obligate themselves for a fee without knowing that
10 it is likely the fee is going to be paid.

11 That was an area that confused me
12 considerably.

13 Q. In your opinion did the source of the fee affect
14 the representation or detriment of the petitioner in this
15 case?

16 A. There is evidence throughout the proceedings that
17 there was a defense that could have been strengthened by
18 investigation and presentation of evidence surrounding
19 members of the SEGM.

20 It is very, very difficult to understand
21 why there wasn't more of an effort to present that
22 evidence.

23 You have a case the state throughout the
24 trial trying to convince the jury Mr. Jones was capable
25 of murder because he was in control. And it is clearly

1 evident that Mr. Jones was telling his lawyers that there
2 were other people in control. These other people had
3 power and status and that was a factor of this case.

4 Why you wouldn't investigate that and
5 present that becomes difficult and somewhat unreasonable
6 to me.

7 I think there is evidence to support there
8 was actual conflict and that influenced the conduct of
9 counsel.

10 Q. Is there evidence in this case that the source of
11 fee affected the quality of the evaluation conducted by
12 the Middle Tennessee Mental Health Institute to the
13 detriment of the petitioner?

14 A. Yes. One of the other areas, clear understanding,
15 is the fee source and in the way in which he was allowed
16 to go to the state mental health agency here effectively
17 unrepresented. He went there and nobody was acting as an
18 advocate while he was being evaluated.

19 Mr. Barrett accepted \$5,000 in November or
20 December of '87. But then took no action.

21 Q. '86?

22 A. Excuse me, '86. But then took no action on
23 behalf of Mr. Jones in March of the next year.

24 Well, during that time was a critical
25 stage for Mr. Jones. He was at the state mental health

1 facility.

2 The experts were asking about mental
3 health history. They were asking about evidence of
4 dysfunction or mental illness at or near the time of the
5 crime. They were getting none of that. That was very
6 prejudicial to Mr. Jones because there was a lot to give.
7 This was a whole life history that could have been
8 presented that would have influenced their assessment, I
9 think, and a lot of contemporaneous evidence surrounding
10 his arrest, banging his head, attempting suicide, doing
11 destructive things that any evaluator would want to know
12 before making an assessment of his mental state.

13 The advocate defense attorney has an
14 obligation to make sure they get that information.

15 That didn't happen. It did not happen
16 because Mr. Barrett had not been provided with the rest
17 of his fee.

18 Q. Should trial counsel have consulted with prior
19 trial counsel?

20 A. Whenever you get involved in a death penalty case
21 or any case where some prior attorney handled part of the
22 case, you have to consult with them and get all their
23 records and files.

24 It's very, very tricky particularly if
25 there has been any discovery as there was in this case.

1 Where there has been an exchange of records between the
2 government or state and first defense counsel, you have
3 to absolutely make sure you get everything that the
4 first defense attorney got or risk being horribly
5 blind-sided.

6 Q. So, your testimony is that he should have
7 consulted with counsel and should have received a copy of
8 his file?

9 A. He absolutely should have consulted with Mr.
10 McAlpin, should have obtained copies of everything that
11 Mr. McAlpin had concerning the representation of Mr.
12 Jones.

13 He should have gotten any notes, memos,
14 research, documents that Mr. McAlpin gathered or put
15 together and made sure he understood if there were any
16 non-documentary transactions, conversations with the
17 district attorney, conversations with witnesses,
18 interactions with family members that were relevant for
19 full and effective representation of Mr. Jones.

20 Without that you are just really
21 prejudicing your client and chances of providing
22 effective assistance.

23 Q. Given the indigency of Mr. Jones and given the
24 paltry fee from the third source, should counsel have
25 reasonably asked the court to declare the petitioner

1 indigent and seek authorization of funds?

2 A. Yes. It is not uncommon in cases for a client to
3 want retained counsel and makes some overture and try to
4 get money for them and simply fail to do it.

5 Virtually every jurisdiction -- and
6 certainly here in Tennessee that does not prevent you
7 from going to the court and saying, look, my client is
8 indigent, he does not have the funds necessary to allow
9 me to be an effective representative for him. I am
10 asking you now to declare him indigent so we can seek
11 funds for he expert assistants and co-counsel and all
12 things required.

13 Q. Was their authority in '87 for Mr. Barrett to have
14 sought this type of assistance from the court?

15 A. Yes. Authority in the Tennessee Code statutory
16 provision that authorizes an attorney on behalf of his
17 client to seek indigency status for the client and,
18 therefore, get the funds necessary to provide an
19 effective investigation and expert assistance, et cetera.

20 There was also constitutional authority.
21 In '84 the United States Supreme Court in Ake versus
22 Oklahoma held that poor people in capital cases have a
23 right to expert assistance. That right is not subject to
24 the limits of their own individual wealth.

25 The court was very -- expressed how you

1 could be prejudiced if you don't have the money to hire
2 your own investigator, your own expert.

3 The rational behind that decision was you
4 know wealthy people can go to court and have their mental
5 health expert or psychiatrist and psychologist evaluate
6 them and then make a disclosure or determination whether
7 they want to proceed on medical health defenses.

8 It is a real advantage if you know your
9 experts are going to say there is nothing wrong with
10 your client. That will influence the way you conduct a
11 case.

12 The court held that poor people ought to
13 have the same opportunity.

14 That was well established by 1987 and was
15 an additional basis for seeking indigent status on behalf
16 of Mr. Jones.

17 Q. Reasonably, should counsel in this case have
18 investigated witnesses who may have had information about
19 Harold Devalle Miller?

20 A. Absolutely. I mean, it is clear that the defense
21 attorney in this case wanted to assign culpability in
22 this crime to the co-defendant.

23 If that is going to be part of your
24 defense then certainly a legitimate area of inquiry, you
25 have to investigate that co-defendant and talk to people

1 that know the co-defendant, have some sense about his
2 propensity to commit a crime like this.

3 What was compiling about it here was that
4 the co-defendant fled the jurisdiction, which in most
5 eyes is indicia of culpability. You want to investigate
6 that, know how that happened.

7 All that would be very, very relevant to a
8 criminal investigation.

9 Q. Reasonably, should counsel have investigated the
10 crime scene and interviewed crime scene witnesses?

11 A. In any capital crime, you need to talk to the
12 witnesses and investigate the crime scene.

13 In this particular case it was especially
14 important. This was a case where there were very few
15 witnesses. The state case against Mr. Jones really
16 turned on the testimony of three people that linked him
17 to this crime at all, the co-defendant Mr. Miller, Mr.
18 Jorden who claimed to have introduced Mr. Jones to the
19 victim and Norma Norman.

20 You simply could not, in my view,
21 reasonably go to trial and be effective without
22 interviewing those people or try to interview them and
23 get a sense about their reliability.

24 The other thing strong about this case
25 where you have in effect two people in a position to say

1 who did it and both co-defendants -- it is not uncommon
2 for them to say the other guy did it. When you are in
3 that situation, you are looking for objective evidence
4 that points to one or the other.

5 By objective evidence, I mean forensic
6 evidence. In this case the victim was stabbed to death.
7 There was evidence from Ms. Norman and from Mr. Miller
8 about that brutal stabbing that the autopsy report
9 revealed that.

10 Would you look at things like blood
11 spattering? You need to look at the room to evaluate how
12 credible any of the testimony was by Ms. Norman or Mr.
13 Miller.

14 In a case like this it really, really is
15 important that counsel interview crime scene witnesses
16 and evaluate the crime scene.

17 Q. And you also mentioned the fact that they needed
18 to evaluate the physical evidence?

19 A. Especially important in a case like this, when you
20 have a stabbing, there are all kinds of things that that
21 kind of crime can tell you about who committed it that
22 are not necessarily common.

23 You can tell the angle of entry into the
24 body, tell something about the size of the person that
25 committed the crime. You have a particularly bloody

1 crime like this, you will see evidence of blood
2 spattering.

3 All that stuff will be very, very
4 probative in establishing whether your client is guilty
5 or not guilty. It is the kind of evidence that isn't
6 subject to impeachment like the witnesses are going to be
7 subject to impeachment. It becomes very important in a
8 case like this.

9 Q. Could fingerprint evidence be relevant?

10 A. Absolutely.

11 Q. Hair and fiber evidence be relevant?

12 A. Absolutely. When you have the murder weapon or
13 theory about the murder weapon, you want to know if your
14 client is implicated in the handling of that weapon.
15 That would be very, very important to a lot of jurors.

16 Q. And could it be relevant whether or not the
17 defendant had blood stain on his clothes?

18 A. Absolutely. One of the most relevant factors in
19 this case to me, how I think of developing the case, is
20 blood spattering.

21 This was a very brutal killing. The
22 prosecution made reference when you see this kind of
23 crime you expect the person that committed the crime to
24 show evidence of blood on his clothes. The presence or
25 absence of the blood on the clothes, whoever killed

1 this person, would be extremely powerful evidence at
2 trial.

3 Q. In this case at the sentencing stage of the
4 trial two prior convictions of the defendant in '70
5 and '72 conviction were introduced as aggravating
6 circumstances.

7 Reasonably, should counsel have
8 investigated the legal and factual history of these
9 cases?

10 A. Yes. This is another area where capital
11 litigation is somewhat different. Before the state can
12 convince a jury to impose the death penalty, they must
13 establish aggravation.

14 There are statutory aggravating factors
15 that is well-known to the parties. Whenever the state
16 will be trying to establish that aggravating factor of
17 prior felony offenses exist, you must investigate the
18 integrity and reliability of the convictions.

19 The Supreme Court case of Johnson versus
20 Mississippi, that makes it very clear that if a prior
21 conviction was unconstitutionally obtained or otherwise
22 unreliable or doesn't really indicate what it purports to
23 indicate about violent behavior, that it can't be a
24 legitimate basis for aggravating in a capital crime.

25 You always need to investigate those prior

1 convictions if the state is going to rely on that. If
2 you can disprove the aggravation or minimize the state's
3 evidence of aggravation, you are halfway home to getting
4 the kind of result at the penalty phase that allows your
5 client to live.

6 Q. You are aware that the 1970 conviction was a
7 conviction of Mr. Jones when he was at a young age and
8 pursuant to the federal youth corrections act?

9 A. That's correct. As such it should not have been
10 used by the state to aggravate the crime in this case. I
11 think that is one of the serious problems surrounding the
12 penalty phase.

13 The state was allowed to use a crime under
14 both state and federal law is simply not admissible or
15 usable for those purposes.

16 Q. Reasonably, should counsel have consulted a
17 forensic pathologist concerning the blood evidence in
18 this case?

19 A. If you're going to trial and trying to convince a
20 jury that the co-defendant did it or co-defendant's
21 description of what happened is not reliable, you want
22 evidence that can't be -- impeachable evidence that
23 doesn't have the bias that comes with serving someone's
24 particular interests.

25 Forensic evidence in a case like this

1 becomes especially important. Crime scene evidence,
2 forensic evidence, blood spattering evidence would
3 probably be the most powerful evidence in a case like
4 this.

5 Because there are a lot of reasons to
6 disbelieve what Mr. Miller said or a lot of reasons to
7 believe what Mr. Jones said. But if the forensic
8 evidence says that one person didn't have blood on their
9 clothing that says something powerful about that person's
10 culpability.

11 Q. Assuming the investigation that you described did
12 not occur in this case -- reasonably, should counsel have
13 consulted forensic psychologicals or psychiatric
14 expertise?

15 A. Absolutely. This case has in it very, very
16 significant history of mental illness. Very powerful
17 evidence that I think would support a very, very strong
18 claim of mental disease or defect that could be useful at
19 the guilt stage is present here.

20 I read Dr. Sadoff's report and was very
21 impressed with his connections between Mr. Jones'
22 identification with children and dogs. To me it just
23 suggests a very strong and compelling defense.

24 You have somebody throughout life has been
25 abused, neglected, tortured, even and at times has had

1 what I call a para-normal identification with animals and
2 children. We have records of him howling like a wolf.
3 That is not the kind of behavior you see.

4 When you see that and connected with
5 episodes of dissociation, that is not remembering, a
6 blanking out. Some of the reports had referred to
7 hysterical blindness.

8 It presents a profile of somebody subject
9 to extreme behavior in circumstances highly stressful.
10 There is no question whatever happened in the house when
11 the people were killed, there was some stressors.

12 An attorney that knows the history and
13 background and gets the kind of input from an expert like
14 Dr. Sadoff would find significant facts that would
15 otherwise seem insignificant.

16 The presence of children in the home,
17 presence of dogs in the home, conflict between the
18 co-defendant about how these kids and animals are going
19 to be treated. All that has a whole new meaning once you
20 know this history.

21 Then it becomes quite plausible to imagine
22 that under these circumstances where there is an alleged
23 threat to the children and alleged threat to these
24 animals, the same tendency to become hysterical, blind,
25 forget -- to become or engage in extreme behavior existed

1 at the time of the crime.

2 That provides a basis for a mental health
3 defense that you won't be able to form and develop unless
4 you get some forensic psychological help.

5 The failure here was a real problem
6 because it should be done with this kind of situation but
7 we now know there was something to gain from that.

8 Q. Was the investigative assistance that Mr. Barrett
9 testified to he had available to him in his firm
10 reasonably sufficient to provide an adequate
11 investigation in this case?

12 A. No. I mean, I think Mr. Barrett had available to
13 him a law clerk who essentially -- my review of the
14 record suggested to me his role was that of a go-for.

15 He was not in a position to interview
16 crime scene witnesses, he did not gather life history
17 information, not in a position to travel to different
18 jurisdictions and collect records, he was not in a
19 position to apply guidance on facts that might point to
20 mental health defenses, et cetera.

21 And again, this is a case where Mr.
22 Jones' background was extremely difficult to trace.
23 He had lived in North Carolina, Philadelphia, Hawaii,
24 Washington State. It is going to take awhile for someone
25 to uncover all the records that are relevant and assess

1 his history.

2 There were military records,
3 institutional records that will take some time to get.

4 I don't think it is reasonable for any
5 attorney to think a law clerk with other duties and
6 obligations, with no training and experience in this area
7 is going to be able to conduct that investigation
8 adequately.

9 Q. As this case was presented at trial by the
10 prosecution in 1987, given this lack of investigation
11 that you described, was defense counsel able to
12 adequately rebut the prosecution?

13 A. No. I mean, the state had its theory and it
14 wasn't a big surprise. The theory was that Mr. Jones
15 went into this house with the intent to kill the victim.
16 The defense had no evidence to address that.

17 The opening argument of defense counsel
18 was everything you hear from the state and state's
19 witnesses will be a lie.

20 It is not a we can tell you about this,
21 we can show you something about this crime. It was
22 basically, we don't believe them.

23 If that is your defense, you need
24 evidence to convince the jury that the witnesses
25 shouldn't be believed. If you have not investigated

1 these witnesses, Mr. Miller and Ms. Norman and talked to
2 the victims, neighbors, to get a perspective on whether
3 they were marijuana dealers versus cocaine dealers, if
4 you haven't talked to Mr. Miller's wife, talked to the
5 people that gave Miller -- allegedly -- and Mr. Jones
6 the weapons, you're not going to be in a position to
7 rebut the state's case.

8 THE COURT: I need to take a short break.
9 We will need to take a 10 minute break.

10 (Whereupon, the Court was in recess.)

11 THE COURT: I apologize. I had to get
12 some orders out on some other things before the clerk's
13 office closed. We can proceed.

14 BY MR. REDICK: (Continuing)

15 Q. Mr. Stephenson, Mr. Tummel asked us to slow down.
16 We will try to slow down.

17 I think you were answering questions about
18 the defense is able to rebut the prosecutors case.
19 Specifically, we may have been addressing your ability to
20 rebut the blood evidence.

21 Let me ask you this question. Given the
22 fact that the state's theory in this case was that this
23 was a killing in an attempt by the defendant to take over
24 the drug territory of this dealing, the victim Patrick
25 Daniels, was the defense able to rebut that theory as to

1 Mr. Jones' motive in the case?

2 A. No. I mean, the defense in this case had no
3 evidence that it presented or could present because there
4 had been no real investigation to challenge the state's
5 theory.

6 Q. Would this presentation have included evidence
7 they may have been able to glean from an investigation
8 concerning the activities of Southeastern Gospel
9 Ministry?

10 A. Absolutely. Mr. Jones had reported to counsel
11 that there were other players in the community that had a
12 role in this activity.

13 I think what is especially important about
14 that is when you have got a crime like this that has this
15 arguably bigger purpose behind it, either to take over
16 the drug dealing or rid the community of drug dealers,
17 you need to make that credible by pointing to people that
18 arguably would have that interest.

19 Here you had evidence that there was a
20 community of folks who have very strong opinions about
21 drug dealing in the community, that had identified people
22 like Mr. Jones and Miller had engaged in the kind of --
23 for want of a better word -- paramilitary training that
24 you would associate with some of these sorts of
25 activities.

1 I think the jury would have been very
2 interested to have known where the weapons came from,
3 their role in assisting Mr. Miller.

4 All that information would be very, very
5 powerful evidence in creating a picture of the crime
6 which was very different than the crime that the state
7 was able to present absent that evidence being fully
8 developed and presented.

9 Q. Considering the fact that the prosecution argued
10 to the jury concerning his mental state, that he knew
11 what he was doing and enjoined what he is doing and that
12 he derived pleasure from what he was doing, that he was
13 not suffering from any type of emotional disturbance, was
14 defense counsel able to rebut that part of the
15 prosecution's case?

16 A. No. Again, without the sort of mental health
17 history and profile and investigation that this case
18 demanded, counsel was left in a situation where he could
19 say nothing.

20 Again, why that is bad in this particular
21 case, had the investigation been conducted a very
22 powerful response could have been made.

23 Mr. Jones had a life history that if
24 nothing else showed that he was not somebody who calmly
25 and coolly and with great enjoyment engaged in these kind

1 of acts of violence.

2 If anything, they were reactions against a
3 lot of trauma and abuse and violence he experienced
4 throughout his life. I think to change the jurors'
5 perception of this case, you would have to present that
6 sort of evidence.

7 Q. Given the failure to investigate the 1972
8 conviction was defense counsel able to even present to
9 the jury a mitigating version of what that defense was
10 about?

11 A. No. The jury heard from the state that Mr. Jones
12 had been previously convicted of murder. That was
13 extremely prejudicial. Again, he had been found guilty
14 of murder for the death of Mr. Daniels and then the jury
15 was told he also had been convicted of a prior murder.

16 Failing to tell the jury that that prior
17 murder had features to it, that is homosexual rapes and
18 assaults that clearly mitigated that on offense, was
19 again very prejudicial.

20 Q. Under all these circumstances and given the fact
21 that Mr. Barrett had only been on the case for about four
22 months before trial and given this failure of the
23 investigation, should he have at least sought a
24 continuance of the case?

25 A. He had two openings. When it became clear it was

1 going to take place in four months, he could either bring
2 in a lot of resources, get a couple attorneys to assist
3 him, get a couple investigators to investigate the case
4 and mental health experts and mitigation specialists in
5 aiding him in comprehending the case or seek a
6 continuance.

7 It is not of my opinion a reasonable
8 option to say it is too late to do anything that might be
9 effective for his client. That is simply not what the
10 Constitution requires.

11 Q. Is there evidence in the record as to whether or
12 not counsel reasonably consulted with his client?

13 Did he know his client?

14 A. Well, I think he clearly didn't know the client's
15 life history, the client's background and said very
16 little to the jury about that.

17 So, I think there was a great deal of
18 evidence to the fact he had not done that.

19 There are communications between Mr.
20 Barrett and Camp post trial that reflect or suggest very
21 poor relationship between he and the client. Again, that
22 is going to undermine his ability to be an effective
23 advocate in this case.

24 Q. Let me direct your attention to the trial of the
25 case and beginning with jury selection. Let me ask you

1 this.

2 Was any theory of defense evidence in the
3 voir dire?

4 A. No. Again, what is most surprising, is that it is
5 clear when you read that voir dire that there is no
6 theory that the defense is trying to pursue.

7 He asked questions about mental illness
8 and never presented evidence on it. There is nothing
9 coherent. He is not -- from a distance -- trying to
10 create a picture of the case to help the jury think about
11 what is going to be presented.

12 There are a lot of, obviously, questions
13 you would want to have developed, questions about drug
14 dealing, questions about mental illness and emotional
15 disturbance, questions about abuse, questions about
16 neglect, questions about parenting.

17 All those things would be powerful
18 pieces of information to know if you're going to
19 develop the kind of theory that I think would have
20 made a difference.

21 Q. What about his opening statement. Was there a
22 theory evidenced in his opening statement?

23 A. What Mr. Barrett told the jury is that everybody
24 in the state that is put on the stand is a liar. He
25 didn't offer any proof as to why that is true. He didn't

1 suggest he had proof to demonstrate that.

2 Again, there was no theory presented to
3 them.

4 They suggested Mr. Miller was in fact
5 responsible for this crime but then didn't support that
6 with any evidence.

7 Q. You mentioned that the three key people in your
8 mind in the prosecution of the case were Robert Jorden,
9 Norma Norman -- and who was the third, do you recall?

10 A. Mr. Jorden and Mr. Miller.

11 THE COURT: Miller, Norman and Mr. Jorden.

12 To make sure I understand it, is Big Rob
13 the same person?

14 MR. REDICK: That's correct.

15 Q. Based upon Mr. Barrett's cross-examination of
16 those prosecution witnesses, was there evidence there he
17 had investigated adequately or not investigated
18 adequately?

19 A. There was a lot of evidence there had been an
20 inadequate investigation and inadequate preparation.

21 I think what is striking about the guilt
22 phase record is at various points Mr. Camp, for example,
23 would interpose an objection and the court would be
24 somewhat upset because the objection should have been
25 filed prior to trial.

1 For example, when it came time the state
2 tried to introduce crime scene photograph of the victim,
3 Mr. Camp made an objection. The court said, why didn't
4 you object earlier? He said, I am just seeing the
5 photographs now. Then it turns Mr. Barrett. I didn't
6 anticipate they would be presented.

7 That is an example of inadequate
8 preparation.

9 The investigation aspects of it, Mr.
10 Barrett could have been in a position to question Mr.
11 Miller extensively about the role of SEGM in this
12 offense. He simply didn't because he had not adequately
13 investigated that.

14 There are lots of questions about where
15 Mr. Jones was in the room and his conduct in the room
16 that he could have developed had he investigated more
17 carefully, what the children might have said or what
18 Norma Norman said in other statements that was
19 inconsistent with the trial testimony.

20 It did reflect an absence of
21 investigation.

22 Mr. Camp cross-examined Mr. Jorden, Big
23 Rob, and had no prior contact with him, had done no prior
24 interview of him.

25 Again, that is something you almost

1 certainly do in a case like this. When there are only
2 three people connecting your client to the crime, one
3 can't say who actually killed the person and the other is
4 the co-defendant and third wasn't even there, it is not
5 unreasonable for counsel to interview the witnesses
6 before trial.

7 Q. Given the evidence of which we are now aware that
8 trial counsel wasn't aware about the blood, about the
9 Southeastern Gospel Ministry, about the mental state, was
10 counsel ineffective or adequate for failure to call any
11 witnesses during the guilt phase of the trial?

12 A. Yes. I think there was a strong defense that is
13 available from the record in the case that any reasonable
14 attorney would have investigated and presented.

15 It certainly would have involved more
16 directly challenging the evidence or more effectively
17 using the evidence that Mr. Jones perhaps was not the
18 killer in the case. Absence of blood on his clothing is
19 very powerful evidence in support of that.

20 Mr. Miller's flight from the jurisdiction
21 and his assistance from the SEGM made him somebody that I
22 think in light of the jury might have been more culpable
23 for the offense.

24 The mental health history that can be put
25 together would have suggested that Mr. Jones rather than

1 being this cool, evil, in control killer was rather a
2 vulnerable, delusional, emotionally disabled person who
3 had been put in a situation where the kind of stressers
4 in his past had made him dysfunctional, engaged in
5 extreme behavior, existed here. I think that would be a
6 very powerful defense.

7 At a minimum it would have created a very
8 different picture of Mr. Jones' role in this case.

9 When you are at the guilt stage of the
10 proceedings, you are trying to do something that in the
11 mind of a jury reduces their sense of the client's
12 culpability.

13 There was a lot to be done that would
14 change the way you look at this. Whether Mr. Jones
15 actually killed the victim or not, when you look at his
16 mental health history, you don't see somebody that got
17 enjoyment running around and killing people and got a lot
18 of love and attention that we all get. That is a
19 different picture.

20 To not present that is, in my judgment, is
21 enormously prejudicial.

22 I was impressed again in the testimony of
23 Mr. Zimmermann when he said juries in this county -- not
24 true of all counties -- I credit his perception on
25 this -- require that a defendant be proved beyond a

1 shadow of a doubt. They don't want to impose the death
2 penalty on someone when there is a question.

3 When you have this kind of blood evidence
4 that strongly suggests Mr. Jones is not the killer, a lot
5 of impeachment evidence that can be brought to bear on
6 Mr. Miller and other players in the community, more
7 likely controllers, I think, you could certainly create
8 some shadow of a doubt and I think a reasonable doubt as
9 well.

10 Q. You testified then you felt it was highly
11 prejudicial.

12 Would you then believe that this failure
13 undermined the confidence in the guilt stage of the
14 trial?

15 A. I think it absolutely did. I think Mr. Jones did
16 not have his day in court, jury did not get all the
17 relevant facts and information that are necessary to make
18 a determination as to his guilt for the offense.

19 Q. Do these defenses you described concerning who the
20 actual assailant is and mental state of Mr. Jones, are
21 they inconsistent or consistent that should be presented
22 in the sentencing stage?

23 A. Well, if I was retrying this case I would be very
24 optimistic about a different result. Part is because
25 these defenses lead quite comfortably to your penalty

1 phase. Those are not always easy to do if you have an
2 alibi defense in the first phrase and then all the mental
3 health stuff. That is difficult. You have to think
4 about consistent theories.

5 Here you had very consistent themes that
6 were readily apparent. Juries do care a great deal about
7 any residual doubt. You had a defense that could have
8 been presented at the guilt phase that talks about mental
9 health and illness and vulnerable to being in a situation
10 where they engaged in the kind of behavior that results
11 in death or they are vulnerable being accused of that and
12 not being able to defend themselves because they
13 dissociate or whatever.

14 Leading to a penalty phase presentation
15 that further explains and documents that history, that
16 talks about how Mr. Jones came to be in the house that
17 night, what circumstances led him there, what path
18 brought him to this situation. All you would be doing at
19 the penalty phase, I think, directly compliments what was
20 presented at the guilt phase. I think it was very
21 powerful.

22 Q. If you presented a defense like this in the
23 guilt stage of the trial, would you be allowed to go
24 into the deep background the abuse and early evidence
25 of mental impairment in the presentation of an insanity

1 defense?

2 A. Absolutely. Here the theory is you are looking or
3 trying to convince the jury that you're not saying Mr.
4 Jones was insane or not culpable at the time the crime
5 took place just because he was accused of murder.

6 You're saying he has a condition, a
7 disorder, he has a history that makes it likely that when
8 you have these kinds of stressers, children at risk,
9 animals at risk, people he has been trained all his life
10 to see as bad people and all this racial self-hatred
11 coming from the father and directed at people like Mr.
12 Daniels, the victim in the case, and fueled by these
13 other role models in the community, people like Boyd and
14 Beard suggesting we will need to do something with the
15 drug dealers, you have a situation where his behavior at
16 the household and involvement in the crime is seen in a
17 radically different light.

18 I think that obviously would make a big
19 difference to the jury and would change the way they
20 evaluate the evidence in the case.

21 Q. In the sentencing stage of the trial, would you
22 be able to develop this background information more fully
23 where that rule of evidence doesn't apply?

24 A. Very definitely. You have some very dramatic
25 mitigation evidence. I look at the evidence in the case

1 and it, in my view, is quite compelling. There aren't
2 many cases I handle that come with this kind of
3 mitigation.

4 Yes, you then would be able to talk about
5 all the relationships between Mr. Jones and his father,
6 between Mr. Jones and his mother, dysfunction of the
7 family, abuse and violence in the household, all the
8 dissociation that came with that violence and lining
9 itself very directly to the circumstances of this
10 offense that in ways are very classic, where the Eight
11 Amendment -- the Supreme Court held that what ought to
12 sway the jury, whether to impose the death penalty or
13 life imprisonment, is circumstances of the offense.

14 There is a lot of evidence to suggest this
15 person has had a life forged in sort of a crucible of
16 violence and certainly fed by a lot of neglect and abuse
17 and dysfunction that puts his conduct on the night of
18 this offense in a very different light.

19 Q. As you look at the mitigation and you reviewed the
20 social history in the case, you are aware that there were
21 several -- many instances in Mr. Jones' past of violence
22 of his own?

23 A. Yes, I am.

24 Q. And have instances of the manifestation of
25 antisocial appearing behavior?

1 A. This case is not unlike many death penalty cases
2 where you have a client whose life, frankly, comes with a
3 lot of bad behavior.

4 There has been bad behavior during
5 childhood and during adolescence, bad behavior during the
6 teen years and as adults.

7 The question the jury is going to ask is
8 do you have answer why. Is it because this person is
9 extremely bad or are there other things to this person
10 that help us understand his behavior?

11 In this particular case there is a lot to
12 this person that helps us understand his behavior.

13 Rather than avoid discussion of the prior
14 acts, you would want to give voice to them to allow the
15 jury to understand the entire path this man has taken.

16 If I am saying to the jury there has been
17 violence in his life and the reason why there has been is
18 the same reason we are here today, then I am going to
19 give full voice to that.

20 There is no question in my mind that could
21 be very, very speculative mitigation.

22 Q. Based upon your experience in defending
23 capital cases over the last decade, how would you
24 compare the strength of the mitigation in this case
25 among others?

1 A. It is some of the strongest mitigation evidence
2 that I have seen. The abuse and neglect that he
3 experienced particularly during childhood, it is quite
4 severe.

5 I guess what makes it stronger than what
6 you see in most cases is there is enough -- because of
7 his father's military involvement -- enough interaction
8 with state mental health procedures and
9 institutionalization that it can be documented.

10 Not often but sometimes you see people
11 with the kind of abuse and neglect you see in this case
12 but hard to document it because there is no proof and
13 relatives are not there.

14 When in this case you have documentary
15 evidence that helps support this stuff. His
16 identification with animals, his verbal -- based upon
17 reports of him howling like a wolf at a very early stage.
18 You have family history, siblings, whoever committed
19 suicide or attempted to throughout their life. These
20 siblings were abandoned at birth in a dramatic way.

21 I think that is present, very powerful and
22 creates a kind of record that is usually strong, in my
23 opinion.

24 Q. In Tennessee, Mr. Stephenson, what is the result
25 of a single juror holding out for life at deliberation

1 and sentencing stage?

2 A. It becomes a life verdict.

3 Q. It is not a hung jury?

4 A. No. What you are trying to do is convince one of
5 the 12 people it makes a difference. You can reduce some
6 of them, and I tell lawyers all the time, think about
7 doing this reduction in very simple terms.

8 My view is that people get the death
9 penalty because they believe the person on trial is the
10 criminal, that that is what they are and that is their
11 life.

12 Your job as a defense attorney is to
13 convince that jury that that person, like the rest of us,
14 is more than the worst thing he has ever done. You want
15 them to understand if you tell a lie, you're not just a
16 liar. If you take something from somebody, you are just
17 not a thief. If you kill somebody, you are not just a
18 killer.

19 To make that meaningful, you have to show
20 what else this person is and what else is going on.

21 In this particular case there is a lot
22 going on, a great deal of dysfunction, great deal of
23 abuse and neglect and mental health problems. There is a
24 lot of things happening in this man's life.

25 That allows the jury to see him more than

1 one person with --

2 Q. Putting ourselves, defense counsel, in capital
3 cases when the jury comes back with a verdict at the
4 guilt stage and confronted with the prospect of
5 addressing the jury at the sentencing stage of the trial,
6 what is the status of the momentum of the courtroom in
7 the mind of defense counsel?

8 A. The defense lost the first part and jury rejected
9 what the defense is saying. You have to realize that the
10 momentum is going against you where you presented very
11 little and you have to change them and talk about your
12 client in a new way, a different way.

13 You have to start calling witnesses that
14 can document your client's life and can tell you
15 something about this person beyond what happened on the
16 night of the crime.

17 You have to do that for several reasons.
18 You have to do that to convince the jury they shouldn't
19 simply punish based upon what they know about the crime.
20 They have no know something about the person and how he
21 got here. That has to happen.

22 Again what was problematic in this case is
23 Mr. Barrett told the jury during opening argument that he
24 was going to do some of that, call friends and family
25 members and call the minister that married them and call

1 other witnesses. And then he didn't do it.

2 I think that exacerbated the problem of
3 momentum you always have to confront when they come back
4 with a guilty verdict.

5 Q. Typically in a case, and specifically this case,
6 can you thwart that momentum, change the course of it
7 with a couple hours, with a couple witnesses?

8 A. Absolutely. It is not uncommon to see jurors very
9 angry at the violence and the destruction that the state
10 has described at the first stage of the trial, and then
11 be moved by evidence of mitigation and life history and
12 mental illness and emotional dysfunction that the defense
13 presents at penalty phase.

14 You can absolutely do that when you have
15 strong mitigation like this. It is quite likely you can
16 do that.

17 Q. Could you, based upon your reading of the record,
18 ascertain a theory of defense at the sentencing stage of
19 the trial?

20 A. No. Again, Mr. Barrett made representations
21 during opening argument about calling other people to
22 testify in his behalf. He did not do that. He simply
23 relied on his client to get on the stand to do whatever
24 he could do.

25 I don't think there was any theory behind

1 that. I think he just hoped.

2 It is telling -- just on this point, I
3 will mention it is telling to me that Mr. Barrett
4 testified in his post conviction testimony that he
5 thought this case was hopeless, he simply didn't think
6 there was anything he could do at the penalty phase to
7 come back with a verdict less than death.

8 As we say as advocates all the time, you
9 can't sell what you won't buy. If that is your
10 mentality, it is hard to convince a jury.

11 You have to have something to say to the
12 jury that you can describe about this case that makes
13 them want to give your client life.

14 The fact that Mr. Barrett admitted to not
15 having that makes the absence of a theory all the more
16 apparent.

17 Q. Knowing what you know about the record that he did
18 not know, do you think this potential for mitigation case
19 in this sentencing trial was hopeless?

20 A. No. As I said, I think it was a very, very strong
21 mitigation case here. As I said before, I think if Mr.
22 Jones gets a new trial, I would be -- somebody who
23 handled a lot of these cases -- I would be very
24 optimistic about his ability to convince a jury to return
25 a verdict that didn't result in death.

1 Q. Based upon your reading of the two witnesses that
2 testified at the sentencing hearing, did it appear that
3 they were prepared to testify?

4 A. No. I think it was clear they weren't prepared to
5 testify. The testimony from Mr. Jones was, for want of a
6 better word, painful.

7 And his wife had not been adequately
8 prepared to contribute anything. I think in some ways it
9 is worse.

10 We do a lot of jury interviews of the
11 cases we handle. We talk to them after it is over. It
12 is worse when you suggest to the jury that you have
13 something to say and then say very little. It almost
14 makes them feel like you had an opportunity and there is
15 absolutely nothing to know.

16 I think that was quite in evidence in this
17 case.

18 Q. Was trial counsel's appreciation or lack thereof
19 for the client's mental state reflected in Mr. Jones'
20 testimony?

21 A. No, I think if you know about his background and
22 you know about his mental and emotional history, you
23 know, just to say get up on the stand and testify is not
24 sensible.

25 Here is somebody that has not

1 historically done well in stress situations, and without
2 much preparation is not going to be in a position to
3 explain.

4 It is already hard for a jury to hear
5 from the client. The client has an obvious interest.

6 So, yes, I think this case clearly
7 demonstrates they did not appreciate how dangerous it was
8 to simply say to Mr. Jones, well, get up on the stand and
9 safe your life.

10 Q. Did his failure to prepare -- trial counsel's
11 failure to prepare these defenses undermine confidence in
12 the outcome of the sentencing stage in the trial?

13 A. Unquestionably had the jury known all that is now
14 known about Mr. Jones' background, about his history,
15 about his mental health problems and emotional problems,
16 about the other circumstances surrounding this crime,
17 about the guilt phase evidence that would still have some
18 play, particularly as Mr. Zimmermann said this morning,
19 the jury wants to be shown beyond a shadow of a doubt he
20 is guilty, no doubt of the outcome.

21 Q. If counsel had been adequately informed or
22 prepared to present the mitigation case that you feel
23 should be presented in this case, should he have been
24 afraid of the acts of violence and other evidence in the
25 record of his behavior?

1 A. No. I don't understand.

2 Acts of violence, deviant behavior,
3 dysfunction is quite often the heart of your mitigation
4 case.

5 When we talk about mitigation in death
6 penalty cases, we are not talking about our client living
7 an exemplary life and he is a wonderful parent, he has
8 been completely law abiding his whole entire life and
9 never did anything wrong. Because of that, he should get
10 a life sentence.

11 That is not typically what you look at.
12 Most my clients have prior convictions, most have had a
13 history of bad behavior, deviant behavior.

14 You have to explain that and put it in
15 context to allow the jury to see that your client's life
16 still has purpose and your client's life still has value,
17 that he is not beyond redemption.

18 I think the evidence in this case
19 powerfully demonstrates that, as it applies to Mr. Jones,
20 that all that is the true. There is a lot here.

21 The history of violence and dysfunction
22 rather than supporting a verdict of death when put in its
23 proper context makes clear how compelling and tragic and
24 sad, frankly, this life has been.

25 What you will be saying to the jury, the

1 saddest thing in the world we could do is kill him
2 because of his disability, because of his dysfunction,
3 because he didn't get the kind of help he needed, because
4 he was unloved when a child and tortured as a child.

5 I think that would be very compelling.

6 Q. Based upon your professional opinion was
7 performance of counsel in this case constitutionally
8 adequate or inadequate?

9 A. In my view clearly inadequate.

10 Q. How far below the standard of care would you
11 assess the performance in this case?

12 A. Well, you don't call any witnesses at the guilt
13 stage and you call no witnesses beyond the client and his
14 spouse at the sentencing stage, I think that is pretty
15 substantially below what is expected of reasonable
16 counsel.

17 When you have the kind of history,
18 documented history and you don't investigate it and don't
19 uncover it, don't present it, don't discuss it or
20 consider it, then we are not talking about a close
21 question, in my opinion, the question of grossly
22 deficient performance.

23 Q. Does the information that Mr. Zimmermann had in
24 his file, some you heard testimony about this morning
25 which was not presented to the jury in this case affect

1 the Sixth Amendment claim in this case?

2 A. It does. There are cases that I have seen where
3 the prosecution out of its own sense of fairness says to
4 the jury, well, the defense has not told you this but
5 there are a few things we want you to know.

6 We want you to know, for example, while
7 there is the prior murder conviction there is some
8 suggestion that that murder was in response to an
9 assault. It was in response to some felonious conduct
10 on the part of the victim. There is evidence that
11 other people are involved that we have not arrested or
12 charged.

13 There is some evidence that Mr. Jones
14 is disturbed because he was acting out when the police
15 arrested him, banging his head and demonstrating suicidal
16 behavior. He showed emotional problems.

17 We want you to be aware about that before
18 the judge is life.

19 The state could have done that.

20 Certainly as a reviewing court, you
21 consider that in terms of evaluating prejudice.

22 You may say they knew enough about his
23 background and still didn't give a verdict of life, to
24 perhaps conclude this wasn't so prejudicial.

25 That obviously didn't happen in this

1 case.

2 Yes, it did have an impact.

3 MR. REDICK: Your Honor, that is all the
4 questions I have.

5 THE COURT: All right. Mr. Baker, are you
6 ready or do you want to take a break?

7 MR. BAKER: I am ready, Your Honor.

8 THE COURT: All right.

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EXAMINATION OF BRIAN STEPHENSON

BY MR. BAKER:

Q. Mr. Stephenson, you stated earlier you are opposed to the death penalty as it is currently applied, correct?

A. Right. My experience with the way the death penalty applied in jurisdictions I work is that poor people have a very difficult time getting legal assistance they need.

I think if we are going to impose the death penalty we need to take more effort than we currently do and make sure it is applied fairly and justly.

Q. You're not satisfied with the current efforts that the states and courts apply in capital cases?

A. Providing legal services?

Q. Yes.

A. No, I am not. I mean, I used to direct the Resource Center and used to be in this state and 19 others. All of them have been defunded.

We have hundreds of people on death row that don't have legal representation. I don't think that is a satisfactory state of affairs.

ABA has taken the same position. That is why they called on that moratorium. I don't think I am

1 alone in that perspective.

2 Q. You don't believe that the current rates of
3 compensation are satisfactory, correct?

4 A. No. Many jurisdictions, I don't believe that is
5 true. That is not true for all.

6 Q. You believe that for Tennessee?

7 A. That's correct.

8 Q. And most states?

9 A. Most states. There are states that now have a
10 death penalty. I think their compensation is adequate.
11 Ohio, New York, California have all schemes that I think
12 are acceptable.

13 Q. You testified here that in your opinion with
14 regard to attorney fees it takes two attorneys and it
15 requires paying them about 60 or \$70,000 apiece,
16 correct?

17 A. Private attorneys. You can have public defenders
18 or people that have full-time salaries that can devote
19 all of their time to these sorts of cases and will get
20 funded assistance in other ways.

21 Q. In regard to the rate of compensation, you're
22 saying 60 or \$75,000 if an attorney is retained?

23 A. Private attorney, yes. That would be my --

24 Q. Times two. About 130, \$140,000?

25 A. Again, the attorney has the kind of practice where

1 they have younger attorneys can provide that service.

2 Q. That does not include investigative or expert
3 services you say are needed?

4 A. Not typically.

5 Q. So, in essence what you are telling us today is
6 you don't believe the current standards for representing
7 capital defendants is sufficient and what you are really
8 doing here today is advocating for higher standards than
9 are current?

10 A. No. I believe the ABA standards are quite
11 excellent and complied with, you have the elements of
12 effective representation.

13 Q. You just stated the standards applied -- not
14 talking about ABA standards -- but standards applied in
15 many states in your opinion are not sufficient?

16 Is that your testimony?

17 A. No. There is a distinction, and perhaps a word
18 issue. Here you are talking about standards. I think
19 about what do lawyers have to do in cases. What I was
20 speaking to earlier is compensation. What are lawyers
21 going to be compensated for?

22 In many situations if you don't provide
23 private attorneys with the compensation they will have a
24 difficulty meeting the standard. I think it is a very
25 difficult question.

1 The standard that is embraced by the ABA
2 and many state jurisdictions is fine.

3 If we don't pay people adequately to
4 perform and meet those standards we have a problem.

5 Q. You're saying if a client is indigent and an
6 attorney has to be appointed, this is the type of money
7 that has to be provided for him to get effective
8 assistance of counsel?

9 A. My sense, if you are talking about the appointment
10 scheme -- you will spend somewhere in this area if you
11 rely on private attorneys that don't have staff
12 investigators. Public defender offices do not provide
13 this sort of service.

14 As I made clear -- and I don't want to be
15 confusing about this -- it is a different cost
16 calculation when you are talking about people that have
17 full-time employment and salary structure position to
18 provide it.

19 Private lawyers that do it more
20 typically, yes, I think you are talking about these
21 kind of sums.

22 Q. Isn't it true what you are really advocating is
23 that you place the steaks so high economically that it is
24 really impossible to impose a death penalty? Isn't that
25 really your agenda?

1 A. Not at all, Mr. Baker. I think lawyers in the
2 death penalty area aren't expected to do any more than
3 lawyers in other areas.

4 If IBM comes to me and asks me to
5 represent them in complex litigation, I wouldn't be
6 ashamed to say we are talking about fees in this area.

7 I don't think this is standard for a fee
8 that is out of line with traditional law practice.

9 Q. Let's talk about the source of the fee in this
10 case that you have talked about.

11 You have stated you believe there was a
12 conflict of interest in this case that rises to the level
13 of ineffective assistance.

14 Was that your testimony?

15 A. No. My testimony is under Tennessee rules --
16 Supreme Court Rule Eight, disciplinary Rule 5-107, a
17 lawyer shall not accept compensation from a source other
18 than his client unless that lawyer discloses to the
19 client fully the source of that funding and any potential
20 conflicts.

21 My view is that did not happen in this
22 case. Therefore, there is a violation of the
23 disciplinary rules, a conflict.

24 Q. You are saying under the legal standards to have a
25 valid claim that would result in some sort of relief for

1 a petitioner in a habeas corpus that standard has not
2 been met?

3 A. No. It is different standard than ineffective --

4 Q. You are familiar with Burger versus Kemp United
5 States Supreme Court --

6 A. Yes.

7 Q. Collier versus Sullizan?

8 A. Yes.

9 Q. The standard in the case sees counsel actively
10 represented conflicting interests and that an actual
11 conflict of interest adversely affected the lawyer's
12 performance.

13 That is the standard?

14 A. In the context of ineffectiveness when you are
15 looking at conflict issues --

16 Q. Isn't that what we are talking about?

17 A. No. I think we are talking about conflict,
18 general conflict that is governed under the standard that
19 presumes prejudice.

20 Courts, when they talk about conflict
21 issues don't require the person that has been
22 disadvantaged by that to prove prejudice. I think when
23 you have a direct violation of the disciplinary rules it
24 is under chronic discipline.

25 The cases you cite are petitioner's argued

1 that some kind of conflict rendered counselor's
2 performance ineffective in violation of the Strickland
3 standard.

4 Q. You're saying United States Constitution does not
5 require that an actual conflict be proven which adversely
6 affected the lawyer's performance?

7 You disagree that is the standard?

8 A. I am following you.

9 Q. You're saying prejudice, but there is a conflict
10 regardless of what it is, prejudice is presumed and,
11 therefore, ineffective assistance of counsel?

12 A. Not regardless what it is. If you have a direct
13 conflict in violation of a disciplinary rule like you
14 have in this case, yes, my position is relevant standard
15 is chronic.

16 There are other conflicts you can have
17 that don't violate the disciplinary rules. Those are the
18 cases you cited.

19 Q. You're saying under chronic this defendant would
20 not have to prove his attorney's performance was
21 adversely affected?

22 A. No. I guess --

23 Q. Does he have to prove that?

24 A. He has to prove that there is a conflict that
25 affected performance. But that the prejudice from that

1 performance is presumed. It is a different analysis.

2 Q. It had to adversely affect the lawyer's
3 performance?

4 A. I am sorry?

5 Q. Maybe I confused you.

6 A. Yes. There has to be some connection between the
7 conflict -- absolutely no question.

8 Q. In this case the evidence is that the fee source,
9 or person who gave the fee to Mr. Barrett was Gail
10 Hughes, a friend of the petitioner, and she had
11 represented it was coming from friends of the petitioner.

12 Do you agree with that?

13 A. No, I think the testimony in the state post
14 conviction hearing, she represented to Mr. Barrett's
15 secretary that it came from Allen Boyd.

16 Q. Mr. Barrett said she didn't say that. So, we have
17 a conflict.

18 MR. REDICK: That is not correct. Mr.
19 Barrett said she didn't say it to him.

20 Q. Let me ask you this.

21 THE COURT: I am not sure, other than Mr.
22 Barrett is not acknowledging in some fashion he knew
23 about it. There at least is a factual dispute.

24 Q. Other than Ms. Gail Hughes' testimony that Mr.
25 Barrett actually knew who the friends were that provided

1 the fee source --

2 A. I am sorry.

3 Q. Other than Gail Hughes, are you aware of any other
4 evidence pointing to the idea that Mr. Barrett knew who
5 the source of the funds was?

6 A. No. I guess to me what is problematic about that
7 is the disciplinary rules require that Mr. Barrett know
8 where the funds came from.

9 Q. Let's look at that issue. We had Mr. McAlpin come
10 in yesterday and tell us about a letter in which the
11 petitioner wrote to him indicating that his friends were
12 getting up the funds to hire the new attorney.

13 At least that suggests the petitioner knew
14 all this was going on, right?

15 A. The petitioner may. But I think that is why the
16 rule talks about -- uses this term -- full disclosure.

17 Because what the advocate has to do is
18 make sure that the petitioner, client understands this
19 could adversely affect or impact what kind of defenses
20 are presented.

21 Mr. Jones was saying that these are the
22 people that were involved, these guns came from some of
23 these folks.

24 Q. If Mr. Barrett had no idea that these funds
25 came from these people who the petitioner says supplied

1 these guns then how could that have affected his
2 investigation? There is no proof anywhere it did?

3 A. There are two things. I don't know how clear it
4 will be. One, it is my position and the rule says that
5 it is not acceptable for counsel not to know where the
6 money is coming from.

7 So, as a matter of convenience when people
8 raise legitimate matters why they didn't do things to
9 implicate the source, there is no problem?

10 Two, I think when you have a very credible
11 line of defense which implicates Mr. Boyd and Mr. Beard
12 and the SEGM and other players in criminally culpable
13 conduct as it relates to the offense and mitigates or
14 changes the control factor that you are trying to assign
15 to Mr. Jones, to fail to investigate that raises the
16 kinds of questions, in my view suggests some problems to
17 his litigation.

18 Q. We have no information that failure to investigate
19 anything was a source of the funds?

20 A. That is why the court doesn't require you prove
21 prejudice with the same sort of precision in this
22 area.

23 In most conflict cases it is difficult to
24 prove that a lawyer didn't do A or B because of the
25 conflict of C or D.

1 It creates an appearance, because these
2 folks from the SEGM were paying him, they were
3 undermining the integrity of the defense to not give him
4 the money to act effective.

5 If you look at the record it is very, very
6 puzzling why they are not presented to the jury or
7 decision-maker as a player in the process by the defense
8 lawyer.

9 When Mr. Jones gets on the stand and gives
10 that testimony at the penalty phase it looks very
11 uncredible.

12 Q. Look at the petitioner's story. He says he is
13 going there to rid Nashville of drug dealers or something
14 to that effect, and it in part is due to some influence
15 this group may have had on him. Although he has, of
16 course, denied at trial that they were actually involved
17 in the murder --

18 A. At that point he already had been convicted, yes.
19 I am aware of that.

20 Q. And you look at his story and evidence,
21 undisputed -- even Mr. Jones admits he referred to
22 himself as Scar Face. We know that.

23 A. There is evidence in the record that Mr. Jones was
24 identified as Scar Face, yes.

25 Q. And even admits that in the record?

1 A. There are places in the record he takes on that,
2 yes.

3 Q. There is evidence in the record that Scar Face is
4 a movie in which an ex-convict seeks to take over the
5 drug trade by starting at the lower level of the drug
6 business and working his way up.

7 That is basically the evidence of this
8 case, right?

9 A. I don't know the movie. I am sorry.

10 Q. What we know from the record, from reading this
11 case?

12 A. Yes, that was suggested, certainly.

13 Q. And we know that he used drugs prior to this
14 murder and right after this murder?

15 A. I think what we know is that there is evidence
16 that he used marijuana and some suggestion of a dot of
17 LSD.

18 What is critical about that in Mr. Jones'
19 mind -- and I think actually a lot of peoples' minds --
20 there was a very different perspective on these kind of
21 drugs than the kind of drugs he was addressing, crack
22 cocaine and heroin, et cetera.

23 Whether that is credible or not is one
24 thing. It is a distinction that means something to him.

25 Q. The prior records indicate that he used heroin and

1 cocaine.

2 Are you aware of that?

3 A. I am not aware of instances where there is some
4 extended use of heroin and crack cocaine. I won't
5 dispute it if it exists.

6 Q. So, some other undisputed evidence in this case.

7 Mr. Jones, I believe, admits it, Norma
8 Norman and Miller testified that it was Jones who was
9 giving the orders and directing what was going on in that
10 crime scene and that Miller basically froze.

11 I don't think there is any dispute about
12 that?

13 A. I think there is a dispute about that. I think
14 that --

15 Q. Even Jones says that Miller -- I don't know his
16 exact words -- but essentially froze and was unable to do
17 anything so he had to take over, right?

18 A. What Mr. Jones says is at the penalty phase after
19 being convicted of this crime. In my -- frankly, my
20 perspective on that, at that point he has been convicted
21 of killing these people and his lawyer's asked him to ask
22 for remorse. You can't do that unless you admit
23 culpability.

24 What Mr. Jones reported to his counsel, to
25 the experts and everyone that evaluated him, he doesn't

1 remember.

2 The evidence that supports that is his
3 mental health history, which gives that failure to
4 remember some credibility.

5 That then is supported by physical
6 evidence to suggest that perhaps he is not the killer
7 because of the absence of blood. All those things, I
8 think, create a real factual dispute whether in fact he
9 killed the victim as he states at that penalty phase when
10 that is the only thing he has been told to say.

11 Q. Of course, we know that Mr. Jones has not always
12 claimed lack of memory?

13 A. I am not --

14 Q. It wasn't his claim to Mr. McAlpin, was it?

15 A. Mr. Jones at one time talks about a third person
16 becomes involved. He never, to my understanding of the
17 record, told his advocate or lawyers that he understood
18 what happened at that crime scene and that he killed the
19 victims.

20 Q. At one point he told Middle Tennessee Health he
21 remembered and remembered it well and goes on --

22 MR. REDICK: Objection. I don't think he
23 did that.

24 THE COURT: I think he told them he
25 remember it. I don't know if he remembered it well.

1 that is something that the jury would evaluate in
2 deciding whether his role in doing that was helpful or
3 harmful.

4 I don't think there is any dispute there
5 was certainly an opportunity to do harm to the children
6 and that didn't happen.

7 Q. And the jury can evaluate Norma Norman's testimony
8 that he threatened to snap their heads off if she didn't
9 get them to the back room?

10 A. The jury can see that as him acting in a
11 desperate way for keeping them from being harmed or a
12 direct threat to him because he was about to act
13 violently toward them.

14 I think when you look at his history and
15 profile and conduct over the last 30 years leading up to
16 this offense the interpretation he was doing whatever he
17 could to keep these kids and animals -- what he perceived
18 to be danger -- from Mr. Miller is not entirely an
19 incredible one and has a lot of force.

20 Q. The fact that he threatens to snap the kids' heads
21 off and they have come out of the room and they are
22 asking their mother what is going on, what is going on,
23 when he tells them to get back in the room he is
24 basically wanting them out of the way because he knows
25 what is coming?

1 A. I don't know that, Mr. Baker. I don't know any of
2 us can say that.

3 THE COURT: It is a fascinating discussion
4 about the facts. Let's get on to what is effective or
5 ineffective assistance of counsel.

6 Q. Now, you talked about what your characterization
7 as a compiling mitigation case was?

8 A. That's correct.

9 Q. Of course, you have read the records and you know
10 his history and misconduct?

11 A. Yes.

12 Q. Includes things such as in the ninth grade pulling
13 a knife on his teacher, pulling a knife on another
14 student, participating in gang warfare. A whole host of
15 other unflattering statements about his conduct.

16 You would agree with that?

17 A. There is no question that Mr. Jones has not
18 lived an exemplary life. He is not somebody to hold out
19 as good all his life and finally one day does something
20 bad.

21 Q. This is a case -- we are not talking about
22 someone's sporadic misconduct in his life but a pattern
23 starting at childhood and going through adulthood.

24 That is a pretty accurate summary, isn't
25 it?

1 A. I don't think so. I think when I look at this
2 record I see somebody who at an early age is subject to a
3 great deal of abuse, who is tied up and beaten by his
4 father, has baseball bat taken to his penis and sensitive
5 parts of the body and made to eat cigarettes and cigars
6 and lick up vomit and all these bizarre and destructive
7 things happening.

8 What I see is somebody learning violence
9 as language, as a way of coping at a very early age. It
10 doesn't surprise me when this young man is in school and
11 conflicts with other children that he becomes violent. I
12 think that is quite predictable.

13 Whether there is a pattern, I don't think
14 you see it as a pattern. That is his life history.

15 What is interesting is that that abuse
16 takes on characteristic, logical mental health features.
17 He then starts engaging in what we would certainly call
18 psychological distress, howling like a wolf, para-normal
19 identification with animals and children, suicide
20 attempts, banging his head.

21 All that stuff presents a picture of
22 somebody in distress, acute distress. There are some
23 times when that distress is more aggravated and severe
24 than others but I don't see it as a pattern of violence
25 per se.

1 Q. You don't see his life as a pattern of
2 violence?

3 A. I see his life as basically surrounded, framed,
4 fueled with acts of violence but that are responses
5 to some very serious emotional and mental health
6 problems.

7 Q. Let me ask you this. You don't deny that he
8 also has a life -- not violent -- but being deceptive and
9 lying? He has a history of that, too?

10 A. There is certainly evidence times he
11 misrepresented aspects of who he is and his identity. I
12 think one of the interesting things is about his needs,
13 his desire for identity relates very much to the
14 connection of the SEGM in this case.

15 Most people in a Bible study and being
16 subjected to this kind of paramilitary stuff wouldn't
17 necessarily see that it really is important for them to
18 go around and start threatening or killing people.

19 You look at Mr. Jones and his life history
20 suggests very strongly he always wanted an identity that
21 is positive, not violent but positive. He wanted that at
22 home and in the military and wanted that in the prison
23 and wanted that when he was with native Americans on the
24 west coast, and wanted it when he came to Nashville and
25 heard the ministers and other people talking about

1 guardian angels.

2 That is relevant in my mind when I think
3 about how we present a defense.

4 Q. So, you're saying -- let's look at his prior
5 records. You say you are familiar with his prior mental
6 diagnosis and history in that regard?

7 A. I have reviewed the prior records, yes.

8 Q. Those records repeatedly state that he is not
9 psychotic, that he has various personality disorders,
10 antisocial disorder, schizoid personality,
11 passive/aggressive personality. Over and over.

12 These are the type things you commonly
13 find in prisoners, is that correct?

14 A. I don't think the kind of behavior we observed in
15 this case is common among anybody.

16 Q. I am talking about the personality disorder.

17 A. Not the multiple personality disorder. Hysterical
18 blindness, the kind of assessments being made in this
19 case are not common.

20 Antisocial personality disorder. Is that
21 a common assessment among prisoners? Yes.

22 Borderline personality disorder,
23 historical blindness. Look at the medication he has been
24 on.

25 Most people in prison don't spend most of

1 their time in prison on Lithium and other medication like
2 Mr. Jones has in in incarceration.

3 Q. What I am asking is what the report is indicating.
4 There is repeatedly no psychosis. In fact if you look at
5 the later part of his prison records most of those
6 indicate that he is mentally healthy according to the
7 progress reports.

8 Would you agree with that?

9 A. I don't.

10 Q. Do you agree the records state that?

11 A. Which records are you talking about?

12 Q. Prison records primarily in the year or two or
13 three before he was released on parol from federal
14 prison?

15 A. The federal prison?

16 Q. Toward the end there was a lot of reports saying
17 he was doing fine, he is mentally healthy, physically
18 healthy?

19 A. There are definitely reports that show he showed
20 improvement.

21 Q. When he got out he got in trouble in South Dakota.
22 You know about that?

23 A. Yes.

24 Q. There was a murder up there and he initially gave
25 a false statement to the police and then gave another

1 statement.

2 You are familiar with that?

3 A. My understanding it was ultimately used by the
4 government to present the prosecution and conviction.

5 Q. You mentioned earlier you had been counsel in,
6 I forget the number, but many, many capital murder
7 trials?

8 A. Cases, yes.

9 Q. How many capital murder trials have you actually
10 actively participated in in the trial?

11 A. At trial level?

12 Q. In the courtroom. As a courtroom attorney, the
13 lead courtroom attorney?

14 A. Sixty or 70.

15 Q. As lead counsel?

16 A. As lead counsel, yes. That would be all stages,
17 trial, appeals.

18 Q. At trial?

19 A. More like ten or so.

20 Q. Those would be as lead counsel?

21 A. That's correct.

22 MR. BAKER: Just one minute, Your Honor.

23 THE COURT: All right.

24 MR. BAKER: That is all, Your Honor.

25 THE COURT: Any redirect?

1 MR. REDICK: No, Your Honor.

2 THE COURT: You may step down. Thank
3 you.

4 All right. We are out of witnesses with a
5 little time. We should talk about whatever we might need
6 to consider regarding what we are facing tomorrow.
7 Tomorrow's witnesses appear to be, if I recall -- again,
8 I am working off memory -- Ms. Walton, Ms. Bynum and we
9 are going to have the discussion with Mr. Mann about the
10 whereabouts of his spouse and then Mr. Baker expressed a
11 present intention of calling Mr. Boyd and Mr. Beard. We
12 have Mr. Winbush possibly and Mr. Blankenship possibly
13 set for another time.

14 What else is it we need to accomplish
15 tomorrow from the petitioner?

16 MR. REDICK: Your Honor, does the state
17 actually intend to call Boyd and Beard?

18 THE COURT: Every time I ask them they say
19 they continue to be on our witness list.

20 MR. BAKER: Your Honor, I am going to make
21 one more call to Mr. Barrett tonight and see what his
22 clients intend to do and make a final decision on that.

23 Additionally, I don't know that I am but I
24 might call Mr. Glanton, the other witness, not with
25 regard directly with any of the things we talked about in

1 regard to Graham Reid or the in camera proceeding that we
2 had but based upon his personal knowledge on the
3 Southeastern Gospel Ministry. I may call him on that.

4 THE COURT: So, you believe Mr. Glanton
5 has personal knowledge about Southeastern Gospel
6 Ministry?

7 MR. BAKER: Yes, Your Honor, some
8 knowledge of it.

9 THE COURT: All right. Well, there you
10 got it. He says he might.

11 MR. REDICK: So, it may be for Boyd and
12 Beard.

13 MR. BAKER: It is maybe for all three. I
14 will look at that and make a decision tonight. Right now
15 they are all possibilities.

16 THE COURT: Well, that raises a
17 fascinating legal question of where an individual in
18 deposition refused to even answer whether he knew Mr.
19 Jones. In fact, I believe at least one of the
20 individuals has refused to answer where they worked on
21 Fifth Amendment grounds, whether the court should be --
22 should allow them to testify and if so under what
23 circumstances.

24 Any comments about that, Mr. Baker?

25 MR. BAKER: Yes, Your Honor. Maybe I can

1 shed some light.

2 THE COURT: I am always in favor of more
3 little rather than less.

4 MR. BAKER: I don't know if I can answer
5 your specific question. But they may still invoke the
6 fifth. If they come in here they may invoke it. I will
7 talk to Mr. Barrett tonight who has indicated to me that
8 they may very well do that. If they are going to do
9 that, I have no reason to bring them in here.

10 Then that leads us to the next question,
11 if we are to that point, then we get to the question I
12 think that maybe the Court is asking with regard to the
13 depositions; what if any inferences can be drawn from
14 that.

15 What I would like to do is have maybe some
16 time next week to research that issue and maybe we could
17 file something with the Court on that.

18 THE COURT: I don't even know the answer
19 about the inferences at this moment. That is something
20 that I think will need to be taken up in post trial
21 documents.

22 The question that has some degree of
23 urgency is where a witness has refused to be deposed,
24 whether that witness can then come in to court and tell
25 his version of events. And I don't know the answer to

1 that.

2 I have actually had that come up before
3 but the context was so radically different that I
4 hesitate to guess.

5 This sounds like, to me, as one of those
6 balancing all the interests in the sound discretion of
7 the court type situations, which I am, of course,
8 comfortable with. I don't know the answer to it.

9 MR. MACLEAN: Your Honor, we have prepared
10 a brief memorandum. We haven't had a chance to study it
11 thoroughly.

12 Our position is without the opportunity to
13 take their depositions these witnesses should not be
14 permitted to testify. Of course, we are very interested
15 in knowing whether they intend to invoke the fifth. I
16 think that is relevant.

17 But we do have a memorandum. I can
18 submit it to the Court now or submit it to the Court
19 later.

20 THE COURT: As I said, I am always in
21 favor of more knowledge. I will take it now if you give
22 Mr. Baker a copy.

23 MR. REDICK: I don't know if this should
24 be filed under seal.

25 THE COURT: I will read it and if it

1 doesn't need to be under seal, we will unseal it. I am
2 also in favor of the public's right to know.

3 Mr. Baker, if you decide to call any
4 witnesses taking the Fifth Amendment in the deposition,
5 prior to that individual being called, you should be
6 prepared to address the question of whether they can or
7 should be allowed to testify.

8 In terms of inferences, I threw that out
9 as something that occurred to me in the process of
10 absorbing all this information. I don't need the answer
11 to that tomorrow.

12 MR. MACLEAN: We have researched that. We
13 have not prepared the memorandum. I have the case law
14 and we can address that to the Court tomorrow or any
15 time.

16 THE COURT: I don't need that addressed
17 now.

18 Regarding inferences, depending on what
19 Ms. Mann does or doesn't do, that issue is out there,
20 too. Probably a little more fuzzy.

21 Now the shoe's on the other foot. Mr.
22 MacLean and Mr. Redick, are you really going to call the
23 other witnesses we have set for the following Friday or
24 are you just placing down your marker?

25 MR. REDICK: No, Your Honor, they haven't

1 been deposed or pled the fifth or anything. We expect to
2 call them. That is our intention. They say they will be
3 here and available to testify.

4 THE COURT: All right. Mr. Blankenship,
5 where is he?

6 MR. REDICK: He is in Johnson City,
7 Tennessee.

8 THE COURT: That is what I forgot. Well,
9 we are faced with the prospect if you put on your two
10 witnesses it is potentially possible by midday we are out
11 of witnesses. I don't guess there is anything I can do
12 about that at this point.

13 The local witnesses don't have to travel
14 and other witness is in east Tennessee. So, I don't
15 guess there is anything we can do about that.

16 MR. REDICK: I asked the witnesses to come
17 Friday afternoon. I was under the impression the Court
18 was going to be in a jury trial next week and adjourn the
19 jury at noon and send them home.

20 THE COURT: That's right. That is the
21 plan unless we can get them here earlier. I was probing
22 whether that was probable. We are set for noon for
23 Friday the 20th unless by some miracle you want to call
24 them tomorrow. That seems like that miracle won't
25 happen.

1 Anything else we ought to take up?

2 MR. REDICK: Your Honor, you are aware, I
3 think you already mentioned, we have two witnesses
4 tomorrow. I think each witness will take an hour to an
5 hour and a half. That is my expectation. Each one is
6 coming from out of town.

7 THE COURT: All right. In order to
8 expedite my decision making in this process and in order
9 to not treat Mr. Tummel unfairly, I have asked Mr. Tummel
10 to work on the transcript of this week next week.

11 As you might guess the transcript of this
12 proceeding is not going to be something of great ease and
13 pleasure. There are a lot of terms and a lot of
14 references to documents, and it may take a bit but he has
15 agreed to do that. I am going to be using a different
16 court reporter for the criminal trial that I have
17 starting on Tuesday.

18 So, I have also asked Mr. Tummel to make
19 available those portions of the transcript that are
20 easily segregated, for instance by day or witness or
21 otherwise when he gets to a natural stopping point so
22 that the parties will have the benefit of the transcript
23 as early as possible, to file what needs to be filed.

24 What is it that you want to file, Mr.
25 Redick and Baker? Do you want to file proposed findings

1 of fact and conclusions of law or would you rather file
2 briefs, or what format do you want to file things in and
3 how much time do you need?

4 MR. BAKER: Your Honor, as far as the
5 state is concerned, we think the most benefit to the
6 Court at this juncture, since I think a lot of things
7 have been briefed extensively, is proposed findings of
8 fact and conclusions of law would be more of a benefit to
9 the Court.

10 Whatever the Court deems the best benefit,
11 we will be glad to do that.

12 THE COURT: There have been no shortage of
13 briefs. The briefs are good. The parties should be
14 complimented. Both sides of the case, the briefs have
15 been outstanding and very helpful.

16 Mr. MacLean.

17 MR. MACLEAN: Your Honor, it is always my
18 preference to write a brief rather than proposed findings
19 and conclusions. I feel confined to the format of
20 proposed findings and conclusions.

21 I will be happy to do whatever the Court
22 would prefer I to do. The important thing here is Your
23 Honor receive the kind of assistance from counsel that
24 Your Honor feels you need. We will do it either way.

25 Then I would like to address the timing

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25 MR. BAKER: Nothing from respondent, Your

1 Honor.

2 THE COURT: All right. I am sure you all
3 want to get off 15 minutes early. That concludes the
4 court for today.

5 We will see you at nine o'clock tomorrow
6 morning

7 (Whereupon, the Court was in recess.)

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